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NO.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

In Re :

RAYMOND J. VAN SKIVER, et ux
ALMA L. VAN SKIVER, Petitioners

SAM A. CROW, U. S. District Judge
for the District of Kansas Respondent

Petition for Writ of Cettiorari to the United States
Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

By RAYMOND J. VAN SKIVER
et ux ALMA L. VAN SKIVER
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as the Proper Person

227

QUESTION PRESENTED FOR REVIEW

I. Should a Writ of Mandamus be issued by the Appellate Court, without delay, to compel the Inferior Court on remand to obey its mandate, to compel the Judge of the Inferior Court to obey the express language of 26 U.S.C. 6203, 6303, 6331 and 6335 (a) & (b), and to compel Orders issued by the Inferior Court contrary to 26 U.S.C. 6203, 6303, 6331 and 6335 (a) & (b) to be set aside.

LIST OF PARTIES

Rule 14 1 (b) of the Rules of the Supreme Court of the United States require that a list of all parties to the proceeding in the Court whose judgment is sought to be reviewed. Whereas, the parties to this action are the Petitioners as listed herein, and the Honorable Sam A. Crow, Judge for the United States District Court for the District of Kansas would be the Respondant.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

No.

In Re :

RAYMOND J. VAN SKIVER, et ux
ALMA L. VAN SKIVER, Pro Per Petitioners

SAM A. CROW, Judge, United States District Court,
For the District of Kansas Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, claiming their Right to Recur, respectfully pray that a Writ of Certiorari to review an Order of the United States Court of Appeals for the Tenth Circuit denying a Petition for Writ of Mandamus, to compel District Court Judge Sam A. Crow, of the United States District Court for the District of Kansas to comply with the precise strictures of Title 26, Sections 6203, 6303, 6331, 6335 (a) and (b), to compel Judge Crow to set aside his Order which lies contrary to Said Statutes, and contrary to the Decisions of the many Courts heretoafter cited.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Tenth Circuit denying Petition For Rehearing En Banc was entered February 21, 1992. It is not reported, and is contained in Appendix I, p. 1a.

The Order of the United States Court of Appeals for the Tenth Circuit denying Mandamus was entered Dec. 30, 1991. It is reported, and is contained in Appendix IV, p. 13 a.

The Orders of the United States District Court for the District of Kansas, is not reported, but were entered :
November 22, 1990, Appendix V, p. 22a;
July 16, 1990, Appendix VII - I, p. 90 - 1 a; and
January 31, 1990, Appendix X, p. 119 a.

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Tenth Circuit denying Quiet Title was entered Dec. 30, 1991. En Banc was denied by Order of the Court of Appeals February 21, 1992. This Petition For Certiorari was filed within 90 days of the Order denying the Petion for Rehearing En Banc.

This Court's Jurisdiction is invoked by Petitioners pursuant to 28 USC ſ254 (1).

STATUTES AND RUELS INVOLVED

Rule 6 (e)	Appendix II, p. 4a, 5a
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Title 26 Section 6335 (a) Appendix III, p. 9a, 12a, IV, p. 15a, 20a, V, p. 26a, 27a, 28a, 30a, VI, p. 32a, 36a, 39a, 40a, 41a, 42a, 43a, 44a, VII, p. 65a, 77a, 78a, 79a, 81a, 82a, 83a, 87a, IX, p. 113a, XI, p. 141a, XII, p. 156a

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Title 28 Section 2410 Appendix V, p. 24a, IX, p. 111a, X, p. 124a, 125a, 126a, XI, p. 129a, 130a, 131a, 132a, 138a, XII, p. 152a

Title 28 Section 445 (a) p. 21

Title 28 Section 453 Appendix VI, p. 34a

Title 28 Section 2073 Appendix III, p. 9a

Title 29 Section 660 (a) p. 7

STATEMENT OF CASE

The unusual circumstances that gave rise to Petition For Mandamus in the Tenth Circuit began 10 years ago when Petitioners filed their Original Complaint in the United States District Court without a basic understanding of either Procedures, or that need for Statutory Consent to sue the United States. (App. VIII, p. 108a)

The facts are undisputed as there has been a taking of both Real and/or Personal property without benefit of that procedural Due Process being accorded Petitioners as is Congressionally mandated within Title 26 Sections 6203, 6303, 6331, and 6335 (a) and (b), – or as guaranteed within Amendments Five and Fourteen.

The Government contends that if its responses to discovery requests were inadequate, Petitioners should have sought a Motion to Compel Discovery. Such thought-patterns is like locking the barn-door after the horse was stolen –"excuse for lack of Service" that is, since FRCP Rule 1002 provides that : "to prove the content of a writing, the original is requiered"!

When it appeared that the District Court would not address the Governments' lack of "furnishing" (Section 6203) / "giving" (Section 6303) Petitioners that mandated Assessment, Petitioners were convinced that District Judge Sam A. Crow was the man members of the local legal Bar said he was – Anti - Taxpayer ! Just as Judge Crows Orders confirmed – while adjudicating Petitioners Complaint before him as the Record reveals.

Upon Appeal, surprisingly, the Tenth Circuit actually went out of its way to create a "fault" within Petitioners attempt to Move the District Court to Reconsider – alleging that Petitioners did not act timely ! (Appendix IV p. 16a). Whereto, Petitioners filed Judicial Notice En Banc, citing that Rule 6 (e) mandates that "3 extra days SHALL be added After Service by Mail", but to no avail ! Talk about high - tech - lynching. they simply denied Rule 6 (e) ! (Appendix IX, p. 112a)

*US v Heffner, 420 F.2d 809, 812 (4th Cir. 1970)

> *"The failure of the . . . Department of Justice to follow their own established procedures was held to be a violation of Due Process."

Thus, the issuance of Writ of Mandamus falls squarely upon the Supreme Court to address the abuse / misuse of Court Rules and/or the Administrative Factfindings Forums' lack of establishing on the Record that substantial evidence to support that the mandated Assessment had been "made" – signed by the Assessment Officer, "furnished", – Section 6203, "given" – Section 6303, to Petitioners, or that Notice of Seizure / Notice of Sale had been personally "given" to Petitioners as mandated within the precise strictures of IRCode 6335 (a) & (b).

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

This Writ should have been granted for the following reasons :

ARGUMENT 1

A Writ of Mandamus Should Issue As A Matter Of Right since the Government has not met its burden of establishing the legal insufficiency of the Complaint !

In the Case of Atlas Roofing v OSHA, (1977) 430 US 442, 51 L.Ed.2d 464, 97 S.Ct. 1261, Justice White held that, "The administrative factfindings should be conclusive IF supported by substantial evidence on the record considered as a whole . . ." (29 USC 660 (a)).

Whereas, in the Case at Bar, Petitioners have continuely maintained that NO substantial evidence has been placed on the Record to establish, that in accordance with the precise strictures of Title 26 USC 6203, that the mandated assessment had ever been "furnished" to the Petitioners – Or "given" to Petitioners, as mandated within Section 6303, – Or mailed to Petitioners after request by letter (p. 94a, 87a, 101a) as was sent to the Service Center – Or secured after a FOIA Request (p. 104a) from those Records as should have been on file at Said Service Center !

Whereas, what in fact was "furnish" Petitioners was A Notice of Deficiency and Demand, which as Agent Boris Bulatksen, points out in his Affidavit (p. 166a, 167a) is prepared by the Wichita Office and sent to the taxpayer by certified mail (p. 88a, 89a). While, on the other hand, Agent Boris Bulatksen, in his inter - office - memo (p. 98a, 168a) maintains that " tax has not been assessed, in response to Petitioners claim for abatement, relating to said Notice of Deficency and Demand. Which establishes that Said Notice of Deficency and Demand is actually sent out to the Taxpayer prior to the making / signing of the Assessment (p. 88a, 89a).

Of further interest, Agent Rogar M. Wood, in his Declaration (p. 162a) declares that the date of Section 6303 (a) Notice to be 10 / 28 / 85. While Agent Boris Bulatksens' "inter - office - memo" relating to abatement, was dated 4 / 2 / 85 (p. 168a). – some six months after that Notice of Deficency and Demand was sent out!

After viewing such IRS activities, what may constitute as being an assessment to the Service – and what IR Code 301.6203 - 1 (p. 101a - 103a) describes as being an assessment, appear not to be one and the same !

> *Western Trucking Co., 340 F.Supp. 1130 (1972)
> *"And until the assessment has been made the tax has not been found to be owing." 26 USCA (TRC 1954) Section 6203 – No Assessment, No levy !

On the other hand, FOIA Request of January 23, 1990, produced Form 23 C (p. 105a) as was signed by Assessment Officer, Juanita L. Roberts, June 30, 1982, allegedly reflected Petitioners Assessment, However, Petitioners were not identified, nor were there any supporting Records as are mandated to establish that signed Assessment was concerning Petitioners.

In addition thereto, Said FOIA Request also produced Forms 4340, (p. 106a, 107a) which did not contain that required signature of the authorized Assessment Officer. But noted thereon was a 23 C date of 11 / 13 /

89, which is two years after the alleged sale of Petitioners properties.

As cited above, these are the Records the District Court relied on to varify that the alleged assessment had been made – however, only the Notice of Deficiency and Demand was received by Petitioners, and as the Records hereto attached reveal, the alleged assessment was made AFTER that mailiing of that Notice of Deficiency and Demand.

Petitioners repeatedly placed these questions before Judge Sam A. Crow, but to no avail. Judge Crow refused to even address one of these questions which must be satisfactorily answered, "IF the conclusions of the administriative factfindings are to be supported by substantial evidence on the record, considered as a whole . . ." The fact is, that Petitioners were never able to contest the alleged assessment itself because they were never "given" any Supporting Records to review !

Thus, as this Court sitting in Certiorari, reviewing the evidence as entered on the Record, and by comparing the same with the District Courts' responses, this Court will begin to understand the wonderment Petitioners have been going through !

Wherefore, after reviewing the Records, it can be clearly determined that :

(b) only a Notice of Deficiency and Demand was sent / received by Petitioners prior to the making of any assessment ;

(b) the mandated assessment, if ever made, was never sent / "funished" / "given" to Petitioners as mandated with in 26 USC 6203 and/or 26 USC 6303 ;

(c) following the many requests for that mandated assessment, Petitioners alleges that the Government simply denied Petitioners requests ;

(d) Petitioners sufficiently alleged that prior to issuing liens on Petitioners house and/or 34 building sites and/or personal properties, the Government did not take the requisite procedural steps of "giving" Notice of Seizure (Sec. 6335 (a)), or "giving" Notice of Sale (Sec. 6335 (b)).

Petitioners believe that the Government has not met its burden of establishing the legal insufficiency of Petitioners Complaint ! Petitioners believe that the misconceptions of the lower Court allows Petitioners to AVOID the sale of their house, and their 34 building sites, and should be rectified without delay and the proper means for accomplishing this is by Mandamus. US v Haley, 371 US 81. See also, Adam v US p. 45 a, 46 a,, Bretz v US, p. 47 a – 52 a, and Goodwin v US, p. 53 a - 62 a.

ARGUMENT 2

A Writ of Mandamus Should Issue As A Matter of Right since the Government has not met its burden of administrating mandated proceedings for Notice of Seizure and/or Sale !

Where the question of Substantial Evidence should be in the least doubt, Title 26 USC 6335 (a), mandates that "Notice of Seizure" must be personally "given" to Petitioners ! Whereas, back when Petitioners did not know procedures, Agent Byrant merely "Tacked" Said "Notice of Seizure" on the door of the house to be sold ! At no time did Judge Crow even bother to address Agent Byrants' lack of Due Process for administrating Notice of Seizure of Said house (2601 N. Cedar Crest Dr., Sedgwick County Kansas) ! As for that alleged "Notice of Sale" – Agent Byrant did not even bother to "mail" any Notice (Sec. 6335 (b)) ! Was Petitioners to make themselves aware of Said Sale ? 26 USC 6335 (b) mandates otherwise !

And when Agent Tincher up and lied about the "giving" Notice of Seizure of 34 building sites to Mr. VanSkiver, and to Mrs. VanSkiver, did Judge Sam A. Crow ask any of the three men who had accompanied Agent Tincher that morning of January 13, 1987, as to what actually took place ? For the Record, Judge Sam A. Crow did nothing ! Even though Petitioners continuely contended that Agent Tincher lied ! And why should Agent Tincher not lie, if the Judge is bound to accept the Agents' word ! Can such be Substantial Evidence ?

Petitioners, by Complaint and Judicial Notice, (p. 35 a, item 11), testified as to Agent Tinchers' "dropting" Said "Notice of Seizure" in the Flower bed. It could be said that Agent Tincher "gave" Mr. VanSkiver "both" Notices of Seizure for those 34 building sites. But one cannot overlook the fact that Agent Tincher did not speak with Mrs. VanSkiver once Mr. VanSkiver came out onto that porch. Mrs. VanSkiver had remained some 25 feet distance from Agent Tincer that morning, and the fact that Said Notices of Seizure were "rolled - up - together", then dropted in the flower bed in front of Mr. VanSkiver, clearly demonstrates that Agent Tincher did not even think to "give" Said Notice to "Mrs." VanSkiver ! (See p. 47a)

Judge Sam A. Crow did not bother to address Agent Tinchers' lack of Service, i.e. to "give" that mandated Notice of Seizure for those 34 building sites to "Mrs." VanSkiver. Does not the Statute mandate that "Mrs." VanSkiver is also to be "given" said Notice of Seizure ?

But what really tipped the scale of Justice was Judge Sam A. Crows' acceptance of Agent Tinchers' "Mailing" Said Notice of Sale ! (p. 28 a). Judge Crow covered himself by saying that, "The Plaintiffs in this Case were given ample opportunity to attend the sale to purchase the seized property"! So what's the purpose of the precise strictures of Section 6335 (b) ?

*Dunn Trucking, 32 BR 182 (Bkrty 1983)

*Failure of, a defect in, either Notice of Seizure or Notice of Sale causes tax sale to be invalid.

26 USCS Section 6335

*In re Bush Garden 10 BR 506, 510 (1979)
*. . . the Notice set forth in IRCode Sec. 6335 (C.C. H. 1980) can be viewed as protection of the taxpayer's continued interest in the seized property . . . Since the Notice of Seizure was not given to the debtor [Mrs. VanSkiver] in this Case, it can not be safely said that debtor right to property were extinguished . . . absent Notice of Seizure did not complete the levy on the account.

*Bartell v Riddele P.C.Cal. 1962, 202 F.Supp. 70
*Requiring Notice to taxpayer on public Sale of property seized by government under tax law is intended to protect taxpayer and failure to comply give taxpayer right to avoid Sale.

Wherefore, Petitioners allege that the government did not personally "give" Petitioners that mandated Notice of Seizure under 26 USC Section 6335 (a) while attempting to seize a house, and later while attempting to seize 34 building sites ! Petitioners also allege that the Government did not personally "give" Petitioners that mandated Notice of Sale while attempting to Sell a house and later while attempting to Sell 34 building sites as mandated within 26 USC Section 6335 (b) ! Thus, Petitioners has sufficiently alleged that prior to conducting the Sale of Petitioners' properties, the government did not meet its burden of establishing the legal insufficiency of Petitioners Complaint as concerns the Governments' Notice of Seizure and/or Sale.

Petitioners believe that the misconceptions of the lower Court gives Petitioners the Right to Avoid the Sale of

Said house and 34 Building sites without delay and the proper means for accomplishing this is by Mandamus !

US v Haley 371 US 18

ARGUMENT 3

A Writ of Mandamus Should Issue As A Matter of Right since the lower Court's Decision was not in keeping with that of the many other Court Decisions !

In matters of law, strict procedures are mandated for the protection of both the taxpayer and for the government. Had the procedures for Section 6203 / 6303 indicated that levy could be maintained without benefit of that signed assessment being given to Petitioners, or that the Sale of properties would be valid where failure of, or defect in, either Notice of Seizure, or Notice of Sale, as mandated within Section 6335 (a) and (b), (See Court Order p. 22 a), then maybe Judge Crows' Decision would not have been out of keeping with the Decision of the Fifth Circuit, wherein the Ninth Circuit adopted its holding from the Fifth Circuit. The Brentz Court (p. 47 a) adopted its holding from the Fifth Circuit, while the Adams Court (p. 45 a) adopted its holding from the Seventh Circuit. Whereas Judge Robert J. Bryan reconsidered his original ruling in the light of Goodwin v US (9th Cir. 1991) (p. 53 a) holding that the IRS must obey the exact strictures of the law – specially, "IF the statutes requires "hand delivery", then delivery by certified mail does not constitute proper service" !

Whereas, Judge Crows' suggestiong that, "VanSkiver had ample opportunity to attend the Sale," (p. 27 a) does not constitute proper service, nor is it in keeping with the Decisions of the many other Court Decisions cited above !

*First Unitarian Church v Los Angles County, 357 US 545 (1968)

> *We hold that the enforcement of procedures which place the burden of proof and persuasion on the taxpayer is a violation of Due Process.

And more recently, in its Order Dated January 16, 1992, Judge Bryan, Western District of Washington at Tacoma, held that :

> ". . . it is hereby Ordered that the Title to real property legally described as (legal discription omitted) is Quieted (declared the owner) in Plaintiff (R. Bay).

Petitioners believe that the lower Courts' misconception as to what constitutes proper service lies contrary to the letter of the law – Sections 6203, 6303, 6335 (a) and (b), and the findings of the many other Court Decisions cited herein above, and should be rectified without delay and the proper means for accomplishing this is by Mandamus ! US v Haley, 371 US 18

ARGUMENT 4

A Writ of Mandamus Should Issue As A Matter of Right since there is NO Absolute Rule as to what period of delay will Bar Relief !

The lower Court, in its Memorandum and Order of Nov. 28, 1990, (p. 22 a), concluded that a Quiet Title Action is a Claim based in Equity, 538 F.Supp. 508. Whereto, Judge Crow concluded that, " . . . in order to seek equity, the Plaintiff must have done equity"! Holding as a matter of law, that Petitioners, had failed to act with sufficient promptness"! However : (See p. 188a)

> *Hoehn v Crews, 144 F.2d 671 (10th Cir. 1944)
> *In equity there is, of course, no absolute rule as to what period of delay will bar relief; each case must be determined according to its own peculiar circumstances."

To its own peculiar circumstances ! But the lower Court concluded that, "as a matter of law, it would be inequitable for the Court to set aside, after more than 2 years of delay, the sale of the property on a mere technicality." (See p. 30 a) (See Argument 5 below)

As a Matter of Law ! Back in 1890, in Moore v Miller, (c.c.) 43 Fed 347, held :

> A bill in equity to Quiet Title under Code Civ. Pro. Section 738, is barred by Statute of limitation (Code Civ. Pro. Sec. 315, 316), unless brought within 10 years from the time defendant takes possession of the land.

Unless brought within 10 years ! Special attention need be paid to the above law as the property of Robert E. Lee's wife was Quieted 20 years after it was seized / sold for taxes, 106 US 196 (1882). In addition thereto but more recently, in Virginia, a lady paid the $500 due and Quieted Title to her grandfather's property, even after a shopping center had been built thereon !

On a mere technicality ! "Statute setting forth method and procedure for giving Notice of Seizure of property for unpaid federal taxes must be substantially complied with by the Internal Revenue Service before tax deed shall be considered and operate as a conveyance to all right, title & interest of delinquent taxpayer interest in the property." Kelly v Lundug, (1985) 495 N.E.2d. 1093, 86 Ill.Dec. 714, 131 Ill.App.3d. 410.

On a mere technicality ! "Tax Statutes are not to be extended by implication beyond the clear import of language used." Greyhound Corp. v US. 495 F.2d. 863 (1944). Whereas, Black's Law Dictionary holds that Natural Justice and Right is to stand side by side with the Law —over riding it in case of conflict — "in case of doubt, are construed most strongly against government." is the way the Greyhound Court ruled !

Whereas, Petitioners laid Title 26 USC 6203, 6303, 6331 (a), 6335 (a) and (b), along side the IRS Agents activities and easily concluded that :

> ". . . there has been a taking of property without benefit of that procedural Due Process, that is required by the 14th Amendment." Sniadach v Family Finance Corp., 395 US 351; 89 S.Ct. 1870 (1969).

Where "the essential elements of Due Process of Law are Notice and Opportunity to be heard." Simon v Craft, 182 US 436. Petitioners were accorded neither, which is mandated as a matter of Inherent Right ! Or, if Government is to come to Equity with clean hands, it must have done Equity ! That is, have given that procedural Due Process in accordance with mandated procedures !

As the instant Case now stands, At NO Time did the Government place any substantial evidence on the Record to show that :

- Notice of Assessment had been "furnished" / "given" to Petitioners as mandated within the precise stricture of Section 6203, or 6303 !
- Notice of Seizure / Sale had been personally "given" to Petitioners as mandated within the precise stricture of Section 6335 (a) or (b) !

"Tacking" that Notice of Seizure upon some door, or "dropping" a "rolled - up" Notice of Seizure in some flower-bed, or "Mailing" that Notice of Sale in an envelope simply does NOT constitute as being a "mere technicality" when that procedural Due Process mandates that Said Notices are to be personally "given" !

Petitioners believe that the Government itself has come to Equity with UN-clean hands, and that the lower Court's conception as to what period of delay will Bar Relief is not to be based upon any Matter of Law, but rather, is to be based upon the peculiar circumstances surrounding Petitioners ATTEMPTS to act with that sufficient promptness when considering the fact that the

Service failed to "give" personal Service to Petitioners, or accord Petitioners that Opportunity to be heard, or that Petitioners had attempted five times before to bring suit, – or that Petitioners had in the beginning been lead astray when the IRS said "you may sue the United States" ! (See p. 108 a).

Petitioners believe that the lower Court's thoughts on what constitutes "Period of delay to Bar Relief" fails to comply with either law or with Equity, thus demonstrating its misconception of Equity and should be rectified without delay and the proper means for accomplishing this is by Mandamus ! US v Haley, 371 US 18

ARGUMENT 5

A Writ of Mandamus Should Issue As A Matter of Right since the lower Court held Pro Se Litigants to the same standards as those for a practicing attorney !

In the case of Haines v Kerner, 404 US 519 (1972), the Haines Court held that Pro Se Litigants could not be held to the same standards as practicing attorneys. Special attention need be given to Judge Sam A. Crow's statement that he "could find no case which precisely matches the facts of this case, (p. 28 a), but then boldly concluded the case of Howard v Adle, 538 F.Supp. 504 (p. 175 a), as being :

Factually Similiar ! Thomas Howard, "was an attorney, thus particulary able to appreciate nature of defect in Notice and need to act swiftly to set aside sale, and where virtually identical scenario was acted out previous year" ! (p. 176 a)

Factually Similiar ! As the Howard Court held, Howard was very familiar with procedures for redemption having previously redeemed the very same parcel on the 120th day, (p. 177 a). Whereas, Petitioners had filed Five Frivolous Pleadings before learning that one need find where the United States has consented to suit by Statute before one can properly present a claim in the District Court as to any defect in the Service's Assessment and/or Notice of Seizure and/or Notice of Sale.

Factually Similiar ! Judge Crow had Case No. 86 - 1882 in hand, and well knew the history behind Petitioners Frivolous Pleadings, and that each had been held Frivolous simply because Petitioners did not know procedures and/or the need to include that Statute of Consent.

Factually Similiar ! To compare VanSkiver to Howard ! A practicing Attorney ! One, who had actually gone through the redemption process ! Simply amounts to out - and - out - abuse of discretion ! Arbitrary and Unreasonable ! Fanciful, if one would but consider the fact that Judge Crow had actually held one of VanSkivers' Pleadings to be Frivolous ! Judge Crow even tried to point VanSkiver in the right direction 10 days after VanSkivers' property had allegedly been seized, (Case No. 86 - 1882), by stating that "one may sue the United States where the United States consents to suit by Statute "! Can 10 days be construed as not being timely ?

Then, it was this same Judge Crow that held, "Van Skiver had ample opportunity to attend the Sale." (p. 27 a), Is VanSkiver to be denied Justice simply because the IRS did not inform him of that Statute of consent when it sent 22 copies, (p. 108 a), saying, "you may bring suit against the United States." Where is it written in the Work place, or on that Form 1040 that one might know that IRS permission to sue, means Nothing in the District Court ? Is Malice / Deception their game?

But of all the Quiet Title Actions on Record, to drag out one where the Plaintiff was a practicing attorney, – then construe it to be Factually Similiar to Petitioners' Action ! Most Amazing ! Petitioners believe that Judge Crow's comparsion lacks initiative, and that his comparison clearly indicates an unreasonable attitude, bias, an arbitrary action of outright tyranny from which Mr. Crow should have disqualified himself in the instant Case (28 USC 455 (a)). Petitioners also believe that the lower Court's comparison clearly demonstrates its misconception of Justice and "should be rectified without delay and the proper means for accomplishing this is by Mandamus"! US v Haley, 371 US 18

ARGUMENT 6

A Writ of Mandamus Should Issue As A Matter of Right since the Appellate Court departed from the accepted and/or usual course of judicial proceedings to abuse / misuse its Rules of Civil Procedure in order to beat - to - death Petitioners Inherent Right to Recur !

When Petitioners placed their Appeal before the Tenth Circuit Court of Appeals, that Appellate Court departed from the accepted norm of judicial proceedings to go out of its way "to - rig" a situation in order to allege a "fault" as to Petitioners past Pleadings ! That is, that Petitioners had failed to file their Motion to Reconsider timely - – within the ten days provided by Rule 59 (e), as opposed to those "3" extra days that "shall be added to the prescribed time After Service by Mail", Rule 6 (e), (See p. 16 a), However, to be exact, the filing time as was stamped upon the Courts' Memorandum and Order by the Court Clerk was, July 16 3:16 PM 1990. Whereas the filing time as was stamped upon Petitioners Motion to Reconsider by the Courts' Clerk was, July 31 10:58 AM 1990, some four hours before that ten (10) day expiration of Rule 59 (e), (See p. 90 - 1a & p. 63 a).

*372 F.Supp. 609 (1974)

> *It is a denial of Due Process if an agency (10th Cir.) fails to obey its own rules !

Whereas, in his address before the American Bar, February 3, 1980, Justice White maintain that :

> Where existing rules and procedures permit abuse, they must be changed ! Where the power lies with Judges to prevent or correct abuse and misuse of the system, Judges must act ! FRCP, Rule 1, p. 16

Notwithstanding Justice Whites' comment to the contrary, abuse / misue of the Rules, was clearly demonstrated by the Tenth Circuit while reviewing the Instant Case ! Fanciful misuse, and by those who are actually charged with over-seeing / correcting such abuse ! And how did that body of Judges react when their own self - created - situation - of - abuse was placed before them for review En Banc ? They simply denied Rule 6 (e). (p. 1a, 2a).

*Smith v Dunn, 720 F.2d 1137

> *Judicial discretion is said to be abused when judicial action is arbitrary, fanciful or unreasonable, Cook v Cook, 231 Kan. 391, 394, 646 F.2d. 464 (1982). The fact that a partys' claim is ultimately denied does not in itself indicate that the claim was frivolous. City of Shawnee v Webb, 236 Kan. 504, 512, 694 F. 2d 896 (1985). Rather, we must look at whether there was a reasonable basis in fact for the claim when it was asserted, and whether the claim was asserted in good faith. K.S.A. 60 - 2007 (b).

Reasonable Basis In Fact was properly and timely asserted by Petitioners since Agent Byrant "Tacked" said Notice of Seizure on some door ! Agent Byrant failed to "give" any Notice of Sale to Petitioners ! And Agent Tinchers' Affidavit stated that Notice of Sale had been "mailed" ! And not to be over - looked, NO substantial evidence was ever placed on the Record by the government to establish that a Notice of Seizure had been "given" to "Mrs." VanSkiver ! FRCP, Rule 11, provides "that pleadings need not be accompanied by affidavit, the Complaint itself will suffice". Nevertheless, Circuit Court Judge Baldock concluded that : (p. 16a, sub. 3) :

> There are no "unique circumstances" in this Case which would permit us to over - look plaintiffs failure to comply with the ten day requirement under Rule 59 (e) and treat this appeal as raising the District Courts underlying judgment for review !

Contrary to Judge Baldock's fanciful opinion of Rule 6 (e), this Rule is not lost amid the maize of 730 pages of the Court's Civil Rules of Procedures as are supposed for Judge's use, also ! But, Rule 6 (e) is to be found at the very beginning – right there so that any alert Judge might know that "3" extra days SHALL be added for Service by Mail in order that he might be able to prevent / correct his own abuse / misuse of the Rules !

Conclusions drawn from Judge Baldock's Action clearly establishes that he acted with the consent of that Tenth Circuit while sitting En Banc ! Any "Reasonable man" would have to conclude that Said Court's abuse of the Rules was actually "Unconscionable" when considered in the light of Rule 6 (e), which mandates that "3" extra days SHALL be added to the prescribed time after service by mail !

As to whether Petitioners Motion to Reconsider was proper, to the Pro Se, there is little or no difference between, To Alter, To Amend, or To Reconsider, as said Rules shall not be abridged, enlarged or modified as are preserved and declared by the Seventh Amendment to the Constitution. 28 USC 2072

Whereas, the Natural person hath an inherent right to Recur, but unless Petitioners are considered to be "fictional persons" : Blake v McClung, 132 US 239

> The Court can only exercise its jurisdiction and authority through the priviledges and immunities granted or protected by the Constitution of the United States of America . . . as the subject matter of the different

> Articles relate and pass through the contract in Article VI : 2 and 3 . . . by construction only can they become justicible or binding on the Court and/or Judges thereof, on and at its face Value . . .

Whereas, acting contrary to Justice White's comment that Judges are to prevent and/or correct abuse / misuse of the Court's Rules on Procedures, this Tenth Circuit Court of Appeals proceeded to abridge, enlarge or modify Petitioners Civil Liberties and/or Inherent Right to Recur – in words to the contrary, kicked Petitioners' Appeal right out the back door !

*89 S.Ct. 1820 (1969) supra

> If the Judges, in deciding whether laws are Constitutional are to be left only to the admonitions of their own consciences, why was it that the Founders gave us a written Constitution at all !

Petitioners believe that the abuse demonstrated by the Tenth Circuit was intended to avoid addressing the misconceptions of the lower Court and should be rectified without delay and the proper means for accomplishing this is by Mandamus. US v Haley, 371 US 18

CONCLUSIONS

Petitioners respectfully submit that a Petition for Certiorari issue for reasons set forth in the arguments above.

Petitioners believe that the administrative factfindings forum failed to establish any substantial evidence that had been placed on the Record to support the authenticity of the alleged Assessment – to prove the content of a writing, the original writing is required, FRCP, Rule 1002. This Rule is a familiar one requiring production of the original of a document to prove its contents.

Whereas, Jenkins v Smith, 99 F.2d 827 (2d Cir. 1938), held that Section 6303 (a), required Notice of Assessment of unpaid taxes in order to protect the person liable . . . that failure . . . to "give" Notice . . . barred the collector's right to collect taxes by levy and distraint. And as the Court held in Able v Campell : All that is required is an assessment. C.A.Tex. (1964) 334 F.2d 339

> This section requiring that Notice of Assessment and Demand for payment be "given" to each person liable for tax was clear and could not be varied by allegedly long - standing, contrary administrative practice.

Bauer v Foley, C.A.N.Y. (1969) 408 F.2d 1331

Whereas, the substantial evidence as was placed on the Record concludes that there has been NO production of the original of any document to prove the contents of the government's alleged assessment as was allegedly made naming Petitioners liable – and thus there was no proof of its signing by any authorized Assessment Officer, as Justice White maintained necessary before any administrative factfindings forum could authorize the Seizure / Sale of Petitioners Properties !

The fact that IRS Agents Byrant and Tincher did not "give" personal Service of that Notice of Seizure / Sale as required within Section 6335 (a) & (b), only further establishes that the Procedural Due Process was not accorded to the herein named Petitioners before being UN-lawfully deprived of their Properties !

It is respectfully requested that this Petition for Certiorari be granted; that this Case clearly demonstrates the need that a stronger emphasis be placed on addressing Court abuse and/or that the Service be made to come to terms with those procedures as are mandated by the Congress.

Respectfully Submitted,

Alma L. Van Skiver

Raymond J. VanSkiver et ux Alma L. VanSkiver
%2220 N. Cedar Crest Dr.
Wichita, Kansas 67223
(316) 722 - 9299

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAYMOND J. VAN SKIVER, et ux
ALMA L. VAN SKIVER Plaintiffs - Appellants,

v.

No. 90 - 3364
D.C. 89 - 1470 - C

UNITED STATES OF AMERICA and JOHN DOES,
Defendants - Appellees.

ORDER

Entered February 21, 1992

Before McKay, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

The court has for consideration appellants' petition for rehearing and suggestion for rehearing en banc. The court also has appellants' "JUDICIAL NOTICE DEMAND FOR JUDGMENT", which the court construes as an additional brief in support of the petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35 (b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

Robert L. Hoecker, Clerk

Not Signed by any
Judge

Appendix II

Case No.
89 - 1470 - C
90 - 3364

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RAYMOND J. VAN SKIVER, et ux,
Plaintiff - Appellants,

v

UNITED STATES OF AMERICA, et al.,
Defendants - Appellees.

JUDICIAL NOTICE

DEMAND FOR JUDGMENT

Raymond J. VanSkiver, et ux
%2220 N. Cedar Crest Dr.
Wichita, Kansas
(316) 722 - 9299

JUDICIAL NOTICE

DEMAND FOR JUDGMENT

COMES NOW the Appellants, Raymond J. Van Skiver, et ux, Alma L. VanSkiver, – Not being Wards of the Court [C.J.S. Title 7, Sec. 2, p. 796] Appearing Specially as a matter of Right / Law, that this Court of Appeals might take Judicial Notice of this Courts Act of Deception / Fraud with respect to :

*FRCP Rule 6 (e)

*(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some procedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed time.

*FRCP Rule 201 (d) & (f)

*(d) a court shall take judicial notice if requested by a party and supplied with the necessary information.

*(f) Judicial Notice may be taken at any stage of the proceeding.

In pursuance herewith Appellants stipulate as to this Courts Acts of Deception / Fraud as was made to apply by this Court in its Decision Making Process so as to deceive Appellants as relating to the time period allowed for making Appellants motion to reconsider was limited to 10 days after the district Courts Judgment as opposed to 13 days as prescribed within FRCP Rule 6 (e). (see subnote 2, page 4, of this Courts' Affirmation of the district Courts' Judgment hereto attached.)

Whereas it can only be concluded that such acts were made without Good Behavior, and were made to deceive / to avoid addressing the district Courts' utter disregard of the IRS lack of Due Process while applying its Code to the VanSkivers. This Court of Appeals has failed to do equal right to the poor and to the rich, 28 USC 453.

WHEREFORE, notwithstanding this Courts Affirmation of the District Courts' Judgment, as was made contrary to FRCP, Rule 6 (e), this Court of Appeals can do no other than render Judgment in favor of the Appellants.

Raymond J. VanSkiver et ux Alma L. VanSkiver

In this case, plaintiffs' motion to reconsider was not served within ten days of the District courts' judgment*

*subnote 2 of page 4 : The district court's judgment was filed July 16, 1990. Under FRCP, 6(a), the ten-day time period for plaintiffs to serve a Rule 59 (e) motion expired on July 30, 1990. The certificate of service on plaintiffs' motion to reconsider is not dated. However, the motion itself is dated July 31, 1990, and the motion was filed with the district court on that day.

*subnote 3 of page 4 : There are no "unique circumstances" in this case which would permit us to overlook plaintiffs' failure to comply with the ten-day requirement under Rule 59 (e) and treat this appeal as raising the district courts' underlying judgment for review . . . .

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing has been made this 6th day of February 1992, by mailing copies thereof to : Charles S Kennedy, III, Trial Attorney; Office of Special Litigation, Tax Div.; U.S. Department of Justice; PO Box 7238; Washington D.C. 20044.

Raymond J. VanSkiver, Petitioner

Case No.
89 - 1470 - C
90 - 3364

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RAYMOND J. VAN SKIVER, et ux,
Plaintiff - Appellants,

v

UNITED STATES OF AMERICA, et al.,
Defendants - Appellees.

PETITION FOR REHEARING EN BANC

DEMAND FOR RELIEF

Raymond J. VanSkiver, et ux
% 2220 N. Cedar Crest Dr.
Wichita, Kansas
(316) 722 - 9299

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RAYMOND J. VAN SKIVER, et ux
Alma L. VanSkiver, Plaintiffs - Appellants,

v. No. 90 - 3364

UNITED STATES OF AMERICA, et al.,
Defendants - Appellees.

PETITION FOR REHEARING EN BANC

COMES NOW the Petitioners, Raymond J. Van Skiver, et ux, Alma L. VanSkiver, to Petition this Tenth Circuit Court of Appeals For A Rehearing of its Findings and/or Order of December 30, 1990, based upon the following points of law / fact which this Court of Appeals has undoubtly overlooked or miapprehended.

POINTS OF LAW MISAPPRENHENDED

Rule 60 (b) :

On Motion and upon such terms as are just, the court may relieve a party from a final judgment, order for the following reasons

(5) a prior judgment upon which it is based has been reversed or otherwise vacated or is no longer equitable that the judgment should have prospective application

(6) the motion shall be made within a reasonable time – not more than one year after judgment, order or proceeding was entered or taken.

28 USC 2072 Rules of Civil Procedure

> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the Right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

*US v Anderson, 584 F.2d 369 (10th Cir. 1975)
*This action for collection of taxes comes within the Seventh Amendment.

BASES OF PETITIONERS COMPLAINT

Petitioners filed their Action to Quiet Title based on the numerous procedural irregularities during the assessment process and/or relating to the seizure and / or sale of property. Specifically :

(1) failure to assess tax liability in strict compliance with the precise strictures of 26 USC 6203;
(2) failure to furnish Petitioners with said assessments as mandated within 26 USC 6203;
(3) failure to personally give Petitioners Said Notices of Seizure and/or sale as mandated within 26 USC 6335 (a) & (b).

PRIOR JUDGMENT NO LONGER EQUITABLE

When the Service abandoned its use of Form 4340 it placed in jeopardy the governments position that any valid assessment had ever been made in relation to Petitioners as mandated by 26 USC 6203.

When the Fifth Circuit held that the Notice of Seizure, and/or Sale, need be given personally to the herein named Petitioners in order to be in compliance with the strict procedures of 26 USC 6335 (a) & (b), it in effect, reversed and/or otherwise vacated, or it became no longer equitable that the District Court's assertion that Petitioners Complaint was not appropriate.

With such events taking place, Petitioners, via Rule 60 (b) (6), had a full year to file their Appeal with The Tenth Circuit – as opposed to 10 days.

Rules of Civil Procedure were never intended to be used to side-step the Due Process Clause of Amendment Five to Our Constitution For the United States :

*Lee v, US, 106 US 196 (1882)

*5. The Constitutional provisions that No person shall be deprived of life, liberty, or property without Due Process of Law, nor private property taken for public use without just compensation, are intended as limitations upon the powers of the Government in its dealing with the Citizen, and relate to that class of rights whose protection is peculiarly within the province of the judicial branch of the government.

6. In regard to the life and liberty of the Citizen, the courts have so often exercised the power by writ of habeas corpus, that there remains no question about their right to do so. The cases here examined show that they are equally bound to give remedy for unlaw ful invasion of rights to property by officers of any branch of the Government.

7. The evils which it is suggested may arise from interference of state or other courts with the exercise of powers essential to government, are illusory, and are insignificant in comparison with the proposition that no relief can be granted when it is asserted that the United States has authorized the wrong.

THE COURT IS DUTY BOUND

The Court is Duty Bound to give Remedy to Petitioners as is well founded within the Fifth Amendment of Our Constitution For the United States / Congress :

*106 US 228

> *Our citations will be confined to the time since Magna Charta declared that no man should be taken or imprisoned, or be disseised of his freehold [these letters of Land Grant now in question are duly assigned to Petitioners] or liberties or free customs, or be out lawed or exiled or in any way destroyed, or be passed upon or condemned, by the lawful judgment of his peers, or by the law of the land; which is the origin of the provision, embodied in the Fifth Amendment of the Constitution of the United States, that NO man shall be deprived of life, liberty, or property without due process of law.

Notwithstanding the Rules of Civil Procedure which shall not abridge, enlarge or modify any substantive right, but rather, are intended to preserve the Right to Trial by Jury as at common law as is so declared by the Seventh Amendment to the Constitution, the Court sought only ways to deny Petitioners their secured Rights of property which is imperivous to collateral attack by any government agency.

Nevertheless, thare has been NO Hearing !

There has been NO trial wherein Petitioners were allowed to speak !

There has been NO Trial by Petitioners Peers.

Petitioners clearly established that there had been NO compliance with 26 USC 6203, 6303, 6331, or 6335 (a) or (b). And the rulings of Reece v Scoggins, 506 F.2d 796 (5th Cir 1975); Adams v US 91 C 1335, May 29, 1991; Yeksigian v Nappi, 900 F.2d 1001, 104 - 5 (7th Cir. 1990); Bretz v US, 6 : 89 CV 290 (Mar. 4, 1991); and Goodwin v US, 90 - 15192 D.C. No. CV 89 - 20333 - SW (9th Cir. June 11, 1991, Clearly establish the reversal, or otherwise vacated, or maintains that it is no longer equitable that the government can merely assert that an assessment had been made or can no longer just nail a Notice of Seizure upon some doorway, or simply mail its alleged Notice of Sale.

Rule 60 (b) (6) allows for any other reason justifying relief from the operation of judgment. Petitioners duly cited their cause for Relief – and within a reasonable time. Any Rules of Civil Procedure to the contrary notwithstanding. Due Process has not been afforded Petitioners. This Court of Appeals is Duty Bound to give Relief.

Respectfully Submitted

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(316) 722 - 9299

PUBLISH

FILED
Dec. 30, 1991

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RAYMOND J. VAN SKIVER, et ux
Alma L. VanSkiver, Plaintiffs - Appellants,

v. No. 90 - 3364

UNITED STATES OF AMERICA, et al.,
Defendants – Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. 89 - 1470 - C)

Submitted on the briefs :

Raymond J. VanSkiver, pro se.

Shirley D. Peterson, Assistant Attorney General, Gary R. Allen, William S. Estabrook, and Annette M. Wietecha, Tax Division, Dept. of Justice, Washington, D.C. for Defendants - Appellees.

Before LOGAN, MOORE, and BALDOCK, Circuit Judges.

LOGAN, Circuit Judge.

Plaintiffs - appellants Raymond and Alma VanSkiver appeal from a district court order, reported as VanSkiver v. United States, 751 F.Supp. 1522 (D. Kan. 1990), deying their motion to reconsider the district court's judgment entered in favor of defendants the United States & John Does.[1] Because we find no abuse of discretion, we affirm.

Plaintiffs, acting pro se, brought this action against the United States and John Does alleging three causes of action: wrongful levy, unauthorized disclosure of tax return information, and quiet title to real and personal property seized by the Internal Revenue Service (IRS) in partial satisfaction of Plaintiffs' tax liability. The United States filed a motion to dismiss alleging lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. This motion was granted in part and denied in part by the district Court. Subsequently, the district court, on July 16, 1990, entered a final order granting summary judgment in favor of the United States as to the claims that remained aganist it and dismissing the entire complaint as to the John Does since they had not been identified and the time for effecting service under Fed, R. Civ. P. 4 (j) had expired.

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See FRCP 34 (a); 10th Cir. R. 34. 1. 9. The case is therefore ordered submitted without oral argument.

On July 31, 1990, plaintiffs filed their motion for reconsideration. See II R. tab 33. Their motion focused exclusively on plaintiffs' claim to quiet title. Plaintiffs complaint sought to quiet title based on numerous procedural irregularities in the assessment of taxes and in the seizure and sale of property. Specifically, Plaintiffs alleged in their complaint that the IRS (1) failed to assess their tax liability in accordance with the procedures required by 26 U.S.C. 6203; (2) failed to serve the notices and demands required by 26 U.S.C. 6303; and (3) failed to comply with the service requirements of 26 U.S.C. 6335 (a) and (b) for notice of sale and seizure. Plaintiffs' motion for reconsideration was directed at the district court's rejection of the alleged procedural lapses under 26 U.S.C. 6203 and 6335. The district court found the motion was not appropriate under the circumstances but also denied it on the merits on November 28, 1990. Plaintiffs filed their notice of appeal on Dec 7, 1990.

This case illustrates the dangers of filing a self-styled 'motion to reconsider'. The Federal Rules of Civil Procedure do not recognize a 'motion to reconsider'. Instead, the rules allow a litigant subject to an adverse judgment to file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59 (e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60 (b). These two rules are distinct; they serve different purposes and produce different consequences. Which rule applies to a motion depends essentially on the time a motion is served. If a motion is served within ten days of the rendition of judgment, the motion ordinarily will fall under Rule 59 (e). See Dalton v. First Interstate Bank of Denver, 863 F.2d 702, 703 - 04 (10th Cir. 1988) ("post - judgment motions filed within ten days of the final judgment should, where possible, be construed as Rule (59 (e) motions"). If the motion is served after that time it falls under Rule 60 (b). See Wilson v Al McCord, Inc., 858 F.2d 1469, 1478 (10th Cir. 1988) ("Because more than ten days had elapsed before the filing of the motion to reconsider, we construe it as a motion pursuant to Fed. R. Civ. P. 60 (b)(6) . . .") (citation omitted)).

In this case, plaintiffs' motion to reconsider was not served within ten days of the district court's judgment.[2] Therefore, the motion must be construed as one prusuant to Rule 60 (b). Plaintiffs' appeal from the denial of the motion raises for review only the district court's order of denial and not the underlying judgment itself. United States v 31.63 Acres of Land, 840 F.2d 760, 761 (10th Cir. 1988); V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 (10th Cir. 1979).[3]

[2] The district court's judgment was filed July 16, 1990. Under Fed. R. Civ. P. 6(a), the ten-day time period for plaintiffs to serve a Rule 59(e) motion expired on July 30, 1990. The certificate of service on plaintiffs' motion to reconsider is not dated. However, the motion itself is dated July 31, 1990, and the motion was filed with the district court on that day.

[3] There are no "unique circumstances" in this case which would permit us to overlook plaintiffs' failure to comply with the ten-day requirement under Rule 59(e) and treat this appeal as raising the district court's under-

Contined to next page

The district court did not abuse its discretion in denying the plaintiffs' motion to reconsider. The district court noted that plaintiffs' brief in support of their motion "basically revisits, albeit in someqhat different forms, the same issues already addressed and dismissed by the court." 751 F.Supp. @ 1523. The court properly recognized that revisiting the issues already addressed "is not the purpose of a motion to reconsider," and advan-[ing] new arguments or supporting facts which were otherwise available for presentation when the original summary judgment motion was briefed" is likewise inappropriate. Id. On this basis alone we affirm the district court's denial of the motion to reconsider.

This court need not, and does not, address the merits of the motion to reconsider because the plaintiffs have failed to demonstrate any basis for Rule 60(b) relief. See United States v 329.73 Acres of Land, 695 F.2d 922, 925 (5th Cir. 1983). Relief under Rule 60 (b) is

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Continued from previous page
lying judgment for review. See Thompson v. INS, 375 U.S. 384, 387 (1964); Stauber v. Kieser, 810 F.2d 1, 1 - 2 (10th Cir. 1982). The Supreme Court has recently articulated a strict construction of the "unique circumstances" doctrine and limited its application to situation "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989). Here, the district court, while considering plaintiffs' motion for reconsideration on the merits, never affirmatively assured plaintiffs that the motion was timely under Rule 59 (e) and effective to toll the appeal period. In the absence of such action by the district court, the "unique circumstances" doctrine is inapplicable.

warranted only in exceptional circumstances. Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., 909 F.2d 1437, 1440 (10th Cir. 1990). A litigant shows exceptional circumstances by satisfying one or more of Rule 60 (b)'s six grounds for relief from judgment. [4]

Plaintiffs' motion did not recite any of the exeptional circumstances warranting relief under Rule 60 (b), nor does our reading of the record disclose any. In essence, plaintiffs' motion reiterated the original issues raised in their complaint and sought to challenge the legal correctness of the district court's judgment by arguing the the district court misapplied the law or misunderstood their position. Such arguments are properly brought under Rule 59 (e) within ten days of the district court's judgment or on direct appeal but do not justify relief from the district court's judgment pursuant to Rule 60 (b). See, e.g., Smith v. Evans, 853 F.2d 155, 159 (3rd Cir. 1988) (motion that "alleges no more than legal error and merely reiterates the arguments contained in the complaint" is a Rule 59 (e) motion); 31.63 Acres of Land, 840 F.2d @ 761 - 62 & n.4 (argument that denial of attorneys' fees was based on a misapplication of the requirements of the Equal Access to Justice Act

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[4] Rule 60 (b) provides in pertinent part :

"On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons : (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 29 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other does not provide a basis for relief under Rule 60(b)); Swam v. United States, 327 F.2d 421, 433 (7th Cir.) (argument that district court "misconceived the character of the causes of action alleged in plaintiff's original complaint" does not come within the ambit of Rule 60(b)), cert, denied, 379 U.S. 852 (1964).

The most favorable consideration that can be given to plaintiffs' motion, in light of their pro se status, see Haines v Kerner, 404 U.S. 519, 520 (1972), is to treat it as one made under either Rule 60(b)(1) ("mistake, inadvertence, surprise, or excusable neglect") or Rule 60(b)(6) ("any other reason justifying relief"). This court has recognized that in some instances relief may be granted under Rule 60(b)(1) on a theory of mistake of law, when, as here, the Rule 60(b) motion is filed before the time to file a notice of appeal has expired. Morris v. Adams-Millis Corp., 759 F.2d 1352, 1358 (10th Cir. 1985). However, such relief is available only for obvious errors of law, apparent on the record. Alvested v. Monsanto Co., 671 F.2d 908, 912-13 (5th Cir.) (relief under Rule 60(b)(1) limited to "perfunctory correction" of obvious errors of law), cert. denied, 459 U.S. 1070 (1982); see also Rocky Mountain Tool & Mach. Co. v. Tecon Corp., 371 F.2d 289,

Continued from previous page

misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

Fed. R. Civ. P. 60(b).

596 - 97 (10th Cir. 1966) ("palpably erroneous award") of interest from date of filing counterclaim rather than from date of entry of judgment correctable under Rule 60 (b)(1). In this case, plaintiffs' motion for reconsideration did not allege any facially obvious errors of law. The motion argues issues primarily surrounding assessment of taxes in accordance with Section 6203 and service requirements of Section 6335. We do not intimate any view on the merits of the issues raised by plaintiffs, but we do recognize that the issues are arguable and do not rise to the level of facially obvious errors of law. Therefore, there is no basis for relief under Rule 60 (b)(1).

Rule 60 (b)(6) has been described by this court as a " 'grand reservoir of equitable power to do justice in a particular case.' " Pierce v. Cook & Co., 518 F.2d 720, 722 (10th Cir. 1975) (en banc) (quoting Radack v. Norwegian Am. Line Agency, Inc., 318 F.2d 538, 542 (2d Cir. 1963)), cert. denied, 423 U.S. 1079 (1976). The kind of legal error that provides the extraordinary circumstances justifying relief under Rule 60 (b) (6) is illustrated by Pierce. In that case, this court granted relief under 60 (b) (6) when there had been a post - judgment change in the law "arising out of the same accident as that in which the plaintiffs . . . were injured." Pierce, 518 F.2d @ 723. However, when the post - judgment change in the law did not arise in a related case, we have held that "(a) change in the law did not justify relief under Rule 60 (b) (6). Collins v. City of Wichita, 254 F.2d 837, 839 (10th Cir. 1958). In this case, plaintiffs' motion did not articulate any circumstance even remotely similar to Pierce, or any other unusual circumstances that would entitle them to relief under Rule 60 (b) (6).

Accordingly, we AFFIRM the district court's denial of plaintiffs' motion for reconsideration. We express no opinion on the merits of the arguments raised by plaintiffs in the motion and discussed by the district court. The United States' request for attorneys' fees on appeal is DENIED.

Not Signed!

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

RAYMOND J. VAN SKIVER and
Alma L. VanSkiver,
Plaintiffs,

v Case No. 89-1470-C

UNITED STATES OF AMERICA and
JOHN DOES,
Defendants.

MEMORANDUM AND ORDER

This matter comes before the court upon the plaintiffs' motion to reconsider. On July 16, 1990, the court issued its memorandum and order in which plaintiffs' motion for summary judgment, motion for an order to strike motion for default judgment, motion to strike of May 15, 1990, and complaint against John Does were each dismissed. The Government's motion for summary judgment was granted.

The plaintiffs have submitted a fifteen page brief in support of their motion to reconsider. the brief is divided into several separately numbered paragraphs. The brief basically revisits, albeit in somewhat different forms, the same issues already addressed and dismissed by the court. This, of course, is not the purpose of a motion to reconsider.

In a motion to reconsider, the court has the opportunity to correct manifest errors of law or fact and to review newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3rd Cir. 1985), cert. denied, 476 U.S. 1171 (1986). Appropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position, the facts or the law, or mistakenly has decided issues outside of the parties presented for determination. See Refrigeration Sales Co. v. Michell - Jackson, Inc., 605 F.Supp. 6, 7 (N.D. Ill. 1983). It is inappropriate for the movant to advance new arguments or supporting facts which were otherwise available for presentation when the original summary judgment motion was briefed. Butler v. Sentry Ins. A. Mut. Co., 640 F.Supp. 806, 812 (N.D. Ill. 1986). The court will, however, briefly address the major points presented by the plaintiffs. The plaintiffs have also made two requests for orders of mandamus.

Appropriateness of Summary Judgment

The plaintiffs contend, inter alia, that the court has misinterpreted the appropriate standard for granting summary judgment and that the court, in its ruling has placed the plaintiffs in the position of "proving the negative." In its July 16, 1990, Memorandum, the court dedicates one page to discussing the appropriate standard or review. Simply put, the plaintiffs have failed to produce any evidence upon which a reasonable juror could find for them under any of the theories they have advanced. Conversely, the Government has adequately demonstrated that the tax assessments were procedurally valid and that apprpriate notices were mailed / and or delivered to the plaintiffs. The Government is entitled to summary judgment as a matter of law.

Validity of the Tax Assessment

The plaintiffs raise several arguments concerning the validity of the tax assessments. The plaintiffs primarily argue that the absence of a Form 23C and the presence of the "highly questionable" Form 4340 invalidates the tax assessment. In Schmidt v. King, 913 F.2d 837 (10th Cir. 1990), a case decided after this court issued its memorandum order on July 16, 1990, the plaintiffs brought a quiet title action in which they sought to "attack the procedures of the assessment and notice and demand and, ultimately, the adjudication of whether they owe taxes." 913 F.2d @ 839. The Tenth Circuit dismissed the plaintiffs' case for lack of jurisdiction. "Section 2410 does not extend to challenges for procedural irreqularities in assessment or collection of taxes." Id. It appears, therefore, that this issue is not properly before the court.[1]

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[1] In any event, the documents provided by the Government adequately demonstrate that a valid assessment was made against the plaintiffs' properly. See U.S. v Chila, 871 F.2d 1015, 1017 - 1018 (11th Cir.), cert. denied, ... U.S. ..... , 110 S.Ct. 498 (1989); Rossi v U.S., 1990 U.S. Dist. LEXIS 11550 (Dist. LEXIS 8930 (N.D. Ohio, july 2, 1990); U.S. v. Dixon, 672 F. Supp. 503 (N.D. Ala. 1987), Aff'd 849 F.2d 1478 (11th Cir. 1988); Walker v, Mirarchi, 1990 U.S. Dist. LEXIS 7942 (M.D. Penn. June 21, 1990).

Validity of the Government's Affidavits

The plaintiffs contend that the affidavits submitted by the Government are not in compliance with Fed. R. Civ. P. 56 (e). First, the plaintiffs contend that the affidavits are prepared without personal knowledge. Second, the defendants contend that the Form 4340 (or any computer generated documents) is "hearsay spawned in hearsay."

Both arguments are without merit. As to the issue of whether or not the Government's affidavits have been prepared by individuals with personal knowledge, the court concludes that the affidavits satisfy the personal knowledge requirement of FRCP, 56 (e). The plaintiffs' interpretation of the phrase "personal knowledge" is either too narrow or inapplicable. For example, Charles I. Tincher's affidavit is clearly based upon his own personal knowledge and/or his own files. As to the other affidavits, those affidavits are based upon each affiant's personal knowledge after reviewing the plaintiffs' file. Other courts' have dismissed similiar attacks made upon the affidavits of IRS' employees.

> Plaintiff argues that Debra Vahe's (Internal Revenue Officer) affidavit cannot meet the "personal knowledge" requirement of Rule 56 (e) since Vahe's declarations are based upon her review of the IRS computer - generated files. Although plaintiff's argument is superficially persuasive, it tends to prove too much in that it would bar almost all affidavits in these sorts of cases since most affidavits are based upon a review of a taxpayer's records. Consequently, Vahe's affidavit complies with Rule 56 (e) in that it is base upon her personal familiarity with plaintiff's case and her review of plaintiff's file.

> n2 Furthermore, even if Vahe's affidavit were somehow not in compliance with Rule 56 (e), the accompanying exhibits would still be admissible since they do not depend upon the affidavit for a foundation.

Vote v. United States of America, 1990 U.S. Dist. LEXIS 7531 (D. Nev. June 6, 1990). See Rossi v. US of America, 1990 U.S. Dist. LEXIS 11550 (D. Oregon August 29, 1990).

As to plaintiffs' argument that Form 4340 is hearsay, the court once again directs the parties' attention to Schmidt v. IRS, 717 F.Supp. 763 (D. Kan. 1989), a case in which Judge Saffels dismissed this same argument. See also Vote v. US, 1990 U.S. Dist. LEXIS 7571 (D. Nev. June 6, 1990); Rossi v. US, 1990 U.S. Dist. LEXIS !! (D. Oregon August 29, 1990). Form 4340 is not hearsay. 26 USC 6335 (a) and (b).

The plaintiffs contend that the Government's failure to strictly follow the procedure required by 26 USC 6335 (a) and (b) invalidates the sale. Specifically, the plaintiffs centend that because the Government failed to personally serve the plaintiffs with notices of seizure and notice of sale, the Government has "erroneously and illegally seized /sold" the plaintiffs property.

The court is not persuaded that the IRS's apparent failure to strictly comply with 26 USC 6335 (b) necessitates a reversal of its earlier entry of summary judgment in favor of the Government. Several reasons support this ruling. The court notes that this argument is fully presented for the first time in the Plaintiffs' motion to reconsider. While the plaintiffs did plead non-compliance with section 6335 in their original complaint, the court can only locate one specific sentence in the plaintiffs' response to the Government's motion for summary judgment which cogently deals with that section. At no point did the plaintiffs refer to any of the case law upon which they now rely on in their motion for reconsideration. The cornerstone of the plaintiffs' argument is Reece v Scoggins, 506 F.2d 967 (5th Cir. 1975). In Reece, an IRS agent personally served Reece with notice of seizure. Over the next two weeks the IRS attempted to give Reece notice of sale, but found no one at home and departed without leaving any written notice at the residence. The IRS did mail Reece notice of sale, however, that letter did not reach Reece's residence until the day of the sale. The Fifth Circuit concluded that because the IRS had failed to meet the procedural requirements of Sec. 6335 (b), the district court properly ordered the purchaser of the land return the property in return for a refund of the purchase price.

The case at bar is factually distinquishable. In this case, the plaintiffs were personally served with notice of seizure. Although the IRS apparently did not attempt to provide personal service of notice of sale, it did send the plaintiffs notice by certified mail. The return receipts bear the plaintiffs' signatures. Because no bidders (including the plaintiffs) appeared at the public auction, the sale was rescheduled to April 23, 1987. Notices were sent to the plaintiffs of the rescheduled sale on April 13, 1987, more than a week prior to the sale. Therefore, unlike the plaintiff in Reece, the plaintiffs in this case were given ample opportunity to attend the sale to purchase the seized property.

The court could find no case which precisely matches the facts of this case. Howard v Adle,- 538 F.Supp. 504 E.D. Mich. 1983), is factually similar. In Howard, the IRS properly served the plaintiffs of notice of seizure. However, the IRS, as in the case at bar, did not attempt to personally serve the plaintiffs with the notice of sale, but instead sent the notice by certified mail. Notwithstanding the IRS' failure to strictly comply with 26 USC 6335, the district court did not set aside the federal tax sale of the plaintiffs' real estate.

The district court recognized that strict compliance with Section 6335 is generally required to uphold the validity of an IRS seizure and sale. However, the district court did not find the fact that the IRS had not complied with Sec. 6335 as dispositive. The district court recognized that a quiet title action is a claim based in equity, 538 F.Supp. @ 508. Therefore, in order to seek equity the plaintiffs must have done equity. The court concluded that the plaintiffs had failed to act with sufficient promptness. Significantly, the plaintiffs in Howard had actual notice prior to the sale.

The district court distinguished Reece and Aqua Bar & Lounge, Inc. v. US, 438 F.Supp. 655 (E.D. Pa. 1977), another case requiring strict compliance with Section 6335. First, neither Reece nor Aqua Bar had considered whether the taxpayer was entitled to equitable relief under the applicable state law. 538 F. Supp. @ 508 - 509.

The court then commented :

> Second, in neither case did the undisputed facts show that the taxpayer received prior written notice of the sale. In Reece not only was there no personal service, but notice of the sale was not mailed in time to be delivered prior to the sale date, and no notice of the adjourned sale date was mailed. Thus, there was a substantial issue whether the taxpayer had been given "an opportunity to be present at the tax sale and bid on the property", the central purpose of the statutory notice requirements, 506 F.2d at 971. The court in Aqua Bar refused to speculate as to whether mailed notice of sale had actually reached the taxpayer because the "purpose of requiring a particular method of giving notice is to prevent disputes over whether notice was received". 438 F.Supp. at 657. (Emphasis added).

538 F. Supp. at 509.

This court finds this analysis persuasive. A quiet title action is an action based in equity. See Erskine v. Dykes' 158 Kan. 788, 150 P.2d 322 (1944). The plaintiffs in this action have pointed to nothing in the record to demonstrate they are entitled to equitable relief. Rather, the record indicates that the plaintiffs, although obviously familiar with the IRS code and pertinent regulations,[2] chose to wait over two years before bringing this quiet title action. The court notes that the notice of seizure personally delivered to the plaintiffs mentions section 6331, the first section under Subchapter D--Seizure of Property for Collection of Taxes. The notice of public received by the plaintiffs through certified mail specifically mentions Sec. 6335. The plaintiffs were sufficiently alerted to the regulations governing the sale of the seized property.

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[2] The record contains several letters wtitten by the plaintifts to the IRS over the past five years. Those documents indicate that the plaintiffs have access and some familiarity with the Internal Revenue Code and pertinent requlations.

The technical non - compliance of the IRS in providing notice is insufficient to warrant the reversal of summary judgment in favor of the Government. Noticeably absent from all of the plaintiffs' discussion of this issue is any contention by the plaintiffs that they did not have actual knowledge of the seizure and sale of the property or that they did not receive timely notice of the sale. The evidence indicates that they were given proper notice of seizure of the property. The January 30, 1987, return receipts indicate that the plaintiffs actually received the notice of sale. Rather than challenge the validity of the service then, or during the 180 period of redemption,[5] the plaintiffs have waited over two years to bring this action. "Equity aids the vigilant and not those who slumber on their rights." Under these circumstances, the Government is entitled to summary judgment.

The purpose of the section 6335 (b) is to insure that the owners of property are given adequate notice of seizure and intended sale of property. In this case the purpose of section 6335 (b) was served. As a matter of law, it would be inequitable for the court to set aside, after more than two years of delay, the sale of the property on a mere technicality.

[5] 26 U.S.C. Section 6337 (b) (1).

Order of Mandamus

The plaintiffs move for an order of mandamus, "pursuant to 26 USC 6203 and Treasury Regulations 301.-6203 - 1, to Move the Court for an Order of Mandamus to Compel the Internal Revenue Service . . . to furnish to the above named Plaintiffs that Congressionally Mandated Assessment," namely a form 23C. The Government contends that if its responses to discovery requests were inadequate, the plaintiffs should have sought a motion to compel discovery.

As the Government suggests, this request is in reality an untimely discovery request. In any event, as discussed above, the documents provided by the Government, namely the Certificate of Assessments and Payments, fulfill the plaintiffs' requests. Therefore, an order of mandamus is both unnecessary and inappropriate.

IT IS THEREFORE ORDERED that plaintiffs motion to reconsider (Dk. No. 33) and Plaintiffs' two motions for orders of mandamus (Dk. No. 34 - 35) are denied.

Dated this 22nd day of November, 1990, at Wichita, Kansas.

Sam A. Crow, U.S. District Judge .

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RAYMOND J. VAN SKIVER, et ux,
Plaintiff - Appellants,

v. Case No. 90 - 3364

UNITED STATES OF AMERICA, et al.,
Defendant - Appellee.

JUDICIAL NOTICE
AFFIDAVIT OF FACT & DEED AS TO LEGAL WRONG
DEMAND FOR RELIEF / JUDGMENT

COMES NOW the Plaintiffs, as the proper persons of their own right – Not being Wards of the Court [C.J.S. Title 7, Sec. 2, p. 796], Appearing Specially as a matter of law to address Plaintiffs' lack of verification as to Fact and Deed that the Court might take Judicial Notice as to "Legal Wrong" and/or "agency action causing legal wrong" within the meaning of Title 26 USC 6203, 6335 (a) & (b), as certain Court Decisions lend support to Plaintiffs' Affirmation of agency action causing legal wrong, (said Court Decisions heretoafter attached and made a part hereof).

*FRCP, Rule 201 (d) & (f)

*(d) a court shall take judicial notice if requested by a party and supplied with the necessary information.

*(f) Judicial Notice may be taken at any stage of the proceeding.

FIRST AFFIRMATION AS TO LEGAL WRONG

1. Whereas the Adam Court, 91 C 1335, May 29, 1991, quoting Laing v US, 423 US 161, 184 (1976) as hereto attached and made a part of VanSkivers First Affirmation of Legal Wrong :

> A proper assessment of tax liability is made by recording the taxpayers liability in the office of the Secretary in accordance with the rules and regulations prescribed by the Secretary. 26 USC 6203. The assessment must be made / [signed] by an assessment officer and include the name of the taxpayer, the nature of the assessed liability, the relevent tax period, and the amount of the assessment. 26 C.F.R. 301.6203 - 1 (1980). A proper assessment is a procedural prerequisite for administrative tax collection mechanisms such as the power to levy.

*91 C 1335

2. Hereto the Adam Court lends support to VanSkivers Affirmation *that the government did not make a formal assessment of [VanSkivers] taxes under 26 USC 6203 and 26 C.F.R. 301.6203 - 1. [VanSkivers also affirm] that the government denied requests for copies of the alleged assessments [see requests hereto attached], as allegedly made against [VanSkivers]. Thus, VanSkivers has sufficiently affirmed that prior to issuing the liens on his property, the government failed to take the requisite procedural steps. The government has not met its burden of establishing the legal insufficiency of the Complaint. Yeksigian v Nappi, 900 F.2d 101, (7th Cir. 1990)

3. Whereas, FRCP, Rule 1002, provides to prove the content of a writing [assessment], the original writing [assessment] is REQUIRED . . .

*372 F.Supp. 609 (1974)

4. *It is a denial of Due Process if an agency [IRS] fails to obey its own rules.

5. Whereas VanSkiver affirm that the IRS has failed to "furnish" VanSkivers with that prerequisite copy of a signed assessment for the years 1978 - 79, 1980 - 81, 1982 - 83, 1984 and 1985 as mandated within the precise strictures of 6203.

*28 USC 453

6. Whereas the District Court failed to support the Laws of the United States.

7. Whereas VanSkivers Objection is entered on the Record as to the Legal Wrong committed against them.

SECOND AFFIRMATION OF LEGAL WRONG

8. In its attempt to collect upon an alleged tax deficiency for the tax years 1978 - 79, 1980 - 81, VanSkivers affirm that the United States posted its alleged Notice of Seizure upon the door of property to be seized, 2601 N. Cedar Crest Dr., Sedgwick County Kansas, even though it was necessary for the posting agent to drive past Van Skivers abode before reaching said 2601 N. Cedar Crest.

9. Whereas VanSkivers affirm that NO written Notice of Seizure, NO written Notice of Sale was given personally to either Mr. VanSkiver, or given personally to Mrs. VanSkiver concerning the alleged property seized / sold at 2601 N. Cedar Crest Dr., Sedgwick County Kansas.

10. In addition thereto, VanSkivers affirm that in the government attempt to collect upon an alleged tax deficiency for the years 1982 - 83, on or about 13th January 1987, IRS agents, Charles I. Tincher, Walter C. Ramsder, Bud George Nitschke, and one unknown agent appeared in the front yard of VanSkivers abode to personally give written Notice of Seizure of 34 lots, Sedgwick County Kansas.

11. Contrary to Mr. Charles I. Tincher statement, Van Skivers hereby affirm that Mr. Tincher failed to comply with the precise strictures of 26 USC 6335 (b). Van Skivers affirm that Mr. Tincher bore in his hand Said written Notice of Seizure, one to be given to Mr. Van Skiver, and one to be given to Mrs. VanSkiver – one affixed to the top of the other, but both were rolled up together. Then, rathen than to personally give said Notices to either Mr. VanSkiver, or to Mrs. VanSkiver, Mr. Tincher "dropted / threw" both Notices into the flower bed at the front approach to the front porch – a cement slab 16 x 24 feet.

12. Said "Flower bed" was between Mr. Tincher and Mr. VanSkiver, while Mrs. VanSkiver had remained to the back of the porch by the front door, more than 25 feet from Mr. Tincher. VanSkivers affirm that Mr. Tincher had no conversation with Mrs. VanSkiver once Mr. VanSkiver came out onto that porch.

13. VanSkivers also affirm that Mr. Tincher made NO attempt to separate one Notice from the other, and that Mr. Tincher made NO attempt to personally give Mrs. VanSkiver Said written Notice of Seizure as bore the name of Alma L. VanSkiver.

14. VanSkiver further affirm that on the date of 18 September 1987, Affidavits stipulating to the fact that "both" Notices of Seizure, were in fact, served on "my person" – that of Raymond J. VanSkiver. Said Affidavits were made a part of the Kansas government record by filing the same with the Sedgwick County Kansas Register of Deeds Office, and mailing certified copies via Return Receipt Mail to the President of the United States, and to the IRS District Office – the same as was placed in evidence by the United States.

15. Whereas VanSkivers Affirm that the United States filed a separate action simply to expunge that same Affidavit from the Kansas Record. The same as was in fact ordered expunged by the District Court of Kansas – where in fact Said District Court has not yet established its Jurisdiction to expunge State Records.

*6 : 89 cv 290, Mar. 1, 1991

16. The Bretz Court, (see attached Order) concluded that *a question exists as to whether leaving the Notice with [Mr. VanSkiver] / [or throwing the same in a flower bed] gave ["Mrs." VanSkiver] proper Notice under the statutes :

*506 F.2d 796 (5th Cir. 1975)

> *Plaintiffs' motion relies upon the specfic language of this statute, and upon Reece v Scoggins. This Court is of the opinion that Reece is controlling over this matter. Section 6335, allowing the sale of a taxpayers' land to satisfy a tax deficiency, must be strictly construed. Id @ 970 - 71. A Citizens' right to own land free of governmental interference is a fundamental principle Id @ 971. Governmental seizure and sale of land is a potent weapon and is generally

only available as a last resort. Id. Due to the harsh consequences. Congress has imposed precise measures which are designed to protect the taxpayer and absent literal compliance with its provisions, the government sale of land should not stand.

17. VanSkivers affirm that Charles I. Tincher made NO attempt to serve upon the person of Alma L. Van Skiver, that alleged written copy of Said Notice of Seizure as is mandated within the precise strictures of 6335 (b).

18. In contradistinction thereto, VanSkivers also affirm that the United States took steps to file an action within the United States District Court seeking to expunge any and all affidavits reflecting agency action causing legal wrong.

19. Whereas Notice of Objection to Said Constructive Fraud is hereby and forthwith made a part of VanSkivers Affidavit in order that the Court might take Judicial Notice as to said Legal Wrongs'

THIRD AFFIRMATION OF LEGAL WRONG

20. In addition to the aforementioned legal wrongs, the United States presented in evidence Affidavits attesting that said Notice of Sale were in fact, "mailed" to the VanSkivers, which agency action lies in direct contradistinction to the precise strictures of 6335 (b), wherein the prescribed procedures mandate that Said Notice of Sale is to be "given personally" to Mr. VanSkiver and to be "given personally" to Mrs. VanSkiver.

(Emphasis added)

21. Hereto the District Court failed to take note of the fact that Said Return Receipt Cards verifing their receipt to be that of the year "1986" as opposed to the year of "1987", the year in which said Notice of Sale was allegedly sent to VanSkiver.

22. Upon VanSkivers making this date discrepency known on the Record, the United States immediately took steps to correct its error by placing in evidence additional Return Receipt Cards bearing the IRS Collection Division Stamp, dated February 02, 1987, so as to correlate with the alleged date of service.

23. Such stamping mechanisums are easily adjusted from one day to the next so as to fit the exact date one may desire ! However, special attention need be given to the endorsed side of said Return Receipt Cards whereupon "NO" year is to be found attesting to date of delievery. As a rule, Return Receipt Cards are not run through the Post Office cancelling Machines. Thus, the IRS Collection Division Stamp appearing upon the Return Receipt Cards would be the work of the IRS . Whereas, NO IRS Collection Division Stamp appeared upon the first set of Return Receipt Cards the IRS submitted into evidence. [IRS Exhibits attached hereto.]

24. Even if the IRS were to prove that its alleged Notice of Sale had been mailed, such agency action amounts to a "confession" of a legal wrong since the mailing of Said Notice does not comply with the precise strictures of 6335 (b) mandating the Notice of Sale must be given personally to the VanSkivers:

*506 F.2d 967 (5th Cir. 1975)

> *The mailing of Notice, even if done in a timely fashion, satisfies the statutes only if the taxpayer has no dwelling or place of business within the revenue district. Id (emphasis added).

25. Whereas, to further affirm as to agency action causing legal wrong, in the case of Goodwin v US, 90 - 151-92, D.C. No. CV - 89 - 20333 - SW (9th Cir. June 11, 1991, hereto attached and made a part of VanSkivers Affidavit, held that :

> [6] The extra ordinary powers granted to the government in levying, seizing, and selling property are dependant on strict compliance with the procedures prescribed by statute. [7] further, because the statute requires strict compliance, [VanSkivers] did not have the burden of demonstrating prejudice [8] Accordingly, as between [VanSkivers] and the government, the seizure and sale of [VanSkivers] property was invalid.

26. Here also, the Goodwin Court affirmed by the 9th Circuit by relying on Reece v Scoggins, 506 F.2d 967 (5th Cir. 1975) .

> Where the Fifth Circuit also addressed the issue of whether Section 6335 must be followed literally. As in the instant case [Goodwin v US] the Plaintiff in Reece had received actual notice of seizure and sale, The government, however, had not served the plaintiff in person or left written notice at his usual place of abode as was required by Sec. 6335. The Fifth Circuit required strict compliance with Sec. 6335. Id - 971. Applying that which was adopted by the Second Circuit in Kulawy, the Fifth Circuit held that Sec. 6335 is "clear and mandatory" and that "absent literal compliance within its provisions", the

government sale of land cannot stand.
Reece 506 F2d @ 971

27. Whereas in this instant case, Mr. Tincher affirmed, by affidavit, as entered on the Record, that he had in fact, "mailed" Said Notice of Sale to the VanSkivers, as opposed to the precise strictures of Sec. 6335 (b), mandating that said Notice of Sale "must" be "given personally" to Mr. VanSkiver, and to Mrs. VanSkiver.

28. Whereas, the Fifth Circuit held that Sec. 6335 is "clear and mandatory", and absent literal compliance with its provisions, the government sale of land cannot stand. The Fifth Circuit adopted its holding from the 2nd, the Ninth Circuit adopted its holding from the 5th Circuit, and the Bretz Court adopted its holding from the 5th Circuit, while the Adam Court adopted its holding from the Seventh Circuit.

29. To the contrary, the District Court held that Van Skivers should have made themselves aware of the Sale ! Or been more timely in filing their Action to Quiet Title ! Or entered Affidavits on the Rocord ! ! ! Such findings do not relate, nor do they equate to the precise strictures of Sections 6203, 6335 (a) & (b) ! ! !

FOURTH AFFIRMATION OF LEGAL WRONG

*18 USC 1018

30. *Whoever being a public officer authorized by any law of the United States to make or give a certificate or other writing, knowingly make and delivers as true such a certificate or writing containing any statement he knows to be false . . .

31. Whereas the alleged Quick Claim Deeds of Nov. 24, 1987, attested to by testimony of Clarence M. King jr., did in fact, contain a false statement as he lent his name to said Quick Claim Deed attesting that :

> The said property was offered for Sale in accordance with the provisions of Section 6335 of the Internal Revenue Code.

32. Notwithstanding Clarence M. King, Jr., testimony to the contrary, Charles I. Tincher, IRS agent confessed via Affidavit that he, in fact, "MAILED" said Notice of Sale to the VanSkivers, which in fact, does not lie in accordance with the precise provisions of Section 6335 (b). (see 28 above)

33. Wherefore, VanSkivers affirm that the prescribed rules and procedures of the Congress have not been supported :

a) 6203 – No Assessment has ever been furnished to the VanSkivers; thus, NO TAX OWING;

b) 6335 (a) – No written Notice of Seizure was ever mailed or given to either Mr. or Mrs. VanSkiver affecting property @ 2601 N. Cedar Crest Dr., Sedgwick County Kansas; (not addressed by Court) ;

c) 6335 (b) – No written Notice of Sale was ever mailed or given to either Mr. or Mrs. VanSkiver affecting property @ 2601 N. Cedar Crest Dr., Sedgwick County Kansas ; (not addressed by the Court)

d) 6335 (a) – No written Notice of Seizure was ever mailed or given to Mrs. VanSkiver affecting 34 lots, Sedgwick County Kansas ;

e) 6335 (b) – No written Notice of Sale was ever given to either Mr. or Mrs. VanSkiver affecting 34 lots Sedgwick County Kansas.

34. WHEREFORE, Clarence M. King, Jr., has been affirmed by Charles I Tincher, and Mr. & Mrs. VanSkiver to having made a false writing by attesting that the alleged sale of land was offered for sale / sold according to the provisisons of 26 USC 6335.

35. Whereas Objection is entered on the Record as to Clarence M. King, Jr., false writing, which consituted a Lack of Due Process and a Legal Wrong on VanSkivers.

AFFIRMATION OF LEGAL WRONGS OTHER THAN AGENCY ACTION

*82 S.Ct. 1459

36. *Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislative thinks them guilty of conduct which deserves punishment. They intended to safe guard the people of this country from punishment without trial by duly constituted courts.

37. Whereas the Glidden Court held that Article I Courts, such as the Kansas District Court / The Tenth Circuit Court of Appeals, are agencies of the legislative or executive branch. *The claims which it hears are claims with respect to which the Govenment has agreed to be sued. As the Court said in McElrath v US, 103 US 426, 440, 26 L.ed 189, 192, since the jurisdiction of the Court of Claims is permissive only, Congress can prescribe the rules and procedures to be followed in pursuing claims against the government.

38. Such is the Subject Action. Congress has consented to be sued, and since the District Court of Kansas / Tenth Circuit Court of Appeals are agencies of the legislative or executive branch, it is to be presumed, that those rules and procedures as prescribed by the Congress were to include the procedures within Section 6203, 6335 (a) & (b), as such is meant to determine the Courts' Jurisdiction.

39. In addition thereto, the District Court declared that VanSkivers had waited too long to bring its action to Quiet Title – it would not be equitable after waiting so long. To the Contrary ! There is no Statute of Limitations on Fraud. Equity applies to those who do Equity, Equity follows Law ! ! Whereas, the rules and procedures stipulated by the Congress, is the Law ! The failure to support the laws of the United States, either by agency action, or by decision of the Court, amounts to Fraud / Lack of Due Process.

40. As for the Tenth Circuit "thinking" that Van Skivers do not want to pay federal taxes – such "thinking" fails to equate with any law of the United States. The Courts jurisdiction is permissive – only to the extent that the Court supports the Laws of the United States / the precise strictures of the rules and procedures prescribed by the Congress – In Contradistinction to the "thinking" of Congress, the Tenth Circuit acted outside its designated jurisdiction to inflict still another Legal Wrong against the VanSkivers.

41. VanSkivers came into this activity not knowing the law, nevertheless, for those with the responsibility for applying that law, a legal wrong was worked against the VanSkivers as the District Court – in direct opposition to the Courts own Rules on Civil Procedures, cited Anderson, 477 US @ 250, to hold that VanSkiver Failed to come forward with affirmative showing of evidence – whereas FRCP, Rule 11, mandates :

> Except when otherwise specifically provided by rules or statute, pleading need not be verified or accompanied by Affidavit.

42. Wherefore VanSkivers timely and properly demonstrated that the United States had not supported the laws of the United States, herein and hereto affirmed the same to be true and verified to be true – not only affirmed by the VanSkivers, but also affirmed by IRS agent Charles I. Tincher, that the rules and procedures of 6335 had not been supported / adhered to by the United States, Clarence M. King, Jr., or by the United States District Court for the District of Kansas.

THEREFORE Raymond J. VanSkiver, et ux Alma L. VanSkiver, hereby Affirm that the foregoing / with attached exhibits demonstrating as to the Second Circuit, the Fifth Circuit, the Seventh Circuit, the Ninth Circuit, the Adam Court and the Bretz Court adhereing to Reece v. Scoggins, wherein Reece adhered to the precise strictures of 26 USC 6203, 6335 (a) & (b), there also affirming the above to be a true and correct statement as to fact and deed – to the best of their knowledge and ability.

Witness their hand as official Seal of Said Affirmation this 24th day of July, 1991.

EXHIBIT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

PAUL A. ADAM
Plaintiff,

v.

UNITED STATES,
Defendant.

91 C 1335

ORDER

Defendant United States placed several liens on pro se plaintiff Paul Adam's property. Complaint, Exhibits A - F. Adam does not dispute his tax liability. Rather, Adam challenges the procedural regularity of the levies by alleging that the government failed to make a prior formal assessment of his tax liability. The government contends in its answer that Adam's suit should be dismissed for faiure to state a claim under Fed. R. Civ. P. 12 (b) (6). The government's contention does not state a specific ground for dismissal, and the government failed to file a supporting memorandum. Adam filed a response.

Under 28 USC 2410, the United States may be named as a party in an action to quiet title to property in which the United States has or claims a lien. However, Section 2410 only provides a limited waiver of the United States' sovereign immunity. Section 2410 allows a party to contest the procedural regularity of a lien. It does not allow a party to challenge the underlying tax liability. Pollack v US, 819 F.2d 144, 145 (6th Cir. 1987); Rodrigues v. US, 629 F.Supp. 333, 339 (N.D.Ill. 1986). Adam appropriately alleges that this action is based solely on the government's procedural failure to provide him with a proper assessment. Adam does not contest the underlying tax liability. Thus, the government is not immune from suit in this action.

A proper assessment of tax liability is made by recording the taxpayer's liability in the office of the Secretary in accordance with the rules and regulations prescribed by the Secretary. 26 U.S.C. Section 6203. The assessment must be made by an assessment officr and include the name of the taxpayer, the nature of the assessed liability, the relevant tax period, and the amount of the assessment. 26 C.R.R. 301.6203 - 1 (1990). A proper assessment is a procedural prerequisite for administrative Tax collection mechanisms such as the power of levy. Laing v. Unitd States, 423 U.S. 161, 184 (1976).

Adam alleges that the government did not make a formal assessment of his taxes under 26 U.S.C. Section 6203 and 26 C.F.R. 301.6203 - 1 (1990). Adam also alleges that the government denied his requests for copies of assessments made against him. Thus, Adam has sufficiently alleged that prior to issuing the liens on his property, the government failed to take the requisite procedural steps. The government has not met its burden of establishing the legal insufficiency of the complaint. Yeksigian v. Nappi, 900 F.2d 101, 104 - 05 (7th Cir. 1990). The motion to dismiss is denied.

Suzanne B. Conlon,
District Court Judge

EXHIBIT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

ROBERT J. BRETZ and
RUBY L. VRETZ,

Vs. 6 : 89 cv 190

UNITED STATES OF AMERICA.

SUMMARY JUDGMENT

On this day came on to be considered Plaintiffs' motion for summary judgment. After careful consideration, the Court is of the opinion that the following order should issue.

In an attempt to collect upon an alleged tax deficiency for the years 1981 - 1983, the United States served a Notice of Seizure upon plaintiff Robert Bretz on April 6, 1989. A Notice of Sale was never personally served upon either plaintiff, although a factual dispute exists as to whether a copy was received by certified mail.[1] On June 13, 1989 plaintiffs' property was sold at a public auction.

[1] Ruby Bretz indicated in her affidavit supporting this motion that she never received a copy of the Notice of Sale. The United States, in its response, contends that Mrs. Bretz did, in fact, receive a copy of the Notice of Sale through certified mail.

Plaintiffs filed this suit pro se on May 9, 1990 alleging, among other things, that this sale should be set aside due to the incorrect Notice of Sale served upon plaintiffs. Plaintiffs recently obtained counsel, and this motion for summary judgment was then filed. All parties agree that the procedural requirements concerning this seizure and sale of property for alleged tax deficiencies is governed by 26 U.S.C. Section 6335 :

> (a) Notice of seizure - - As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property . . ., or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain . . . in the case of real property, a description with reasonable certainty of the property seized.
>
> (b) Notice of sale - - The Secretary or his delegate shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof . . . .

The parties agree that the subsection (a) Notice of Seizure was complied with as it pertained to Mr. Robert Bretz. The parties also agree that Mrs. Bretz never received a Notice of Seizure, and a question exists as to whether leaving the notice with Mr. Bretz gave Mrs. Bretz proper notice under the statute. After carefully considering the motion and its supporting affidavits, the Court is of the opinion that the Notice of Seizure was properly served upon Mrs. Bretz since it was "left at [her] usual place of abode." Id.

However, subsection (b) raises an entirely different issue as it relates to the instant case. That section requires that a Notice of Sale also be served upon the owner of the property in a manner prescribed by subsection (a). The affidavits submitted by plaintiffs set out that neither of them received a Notice of Sale, whether by personal service or through certified mail. The United States also agrees that no personal service was made upon plaintiffs. However, it further contends that service was completed through certified mail upon Mrs. Bretz on May 16, 1989[2] yet it fails to supply this returned receipt to the Court. This fact is directly contested by Mrs. Bretz in her affidavit.

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[2] The affidavit of Richard A Griffits, a Collection Revenue Officer, stated that Mrs. Bretz signed the return receipt on May 16, 1989.

Also, the United States contends that this alternative method of service was necessary because it feared that violence might be used against its representatives. However, defendant admits that when a potentially dangerous situation such as that arises, a revenue officer can request an armed escort to accompany him. This procedure was, in fact, used when the Notice of Seizure was served upon Mr. Bretz, but was not followed for the Notice of Sale.

Defendant agrees that the owner of the property could be readily located. According to the specific language of the statute, the owner of the property must either be personally served with the notice, or it can be left at the owner's usual place of abode or business. Mailing the notice is allowed only if (1) the owner of the property cannot be readily located, or (2) the owner has no dwelling or place of business within each district. Neither of these two situations exists in the instant case.

Plaintiffs' motion relies upon the specific language of this statute, and upon Reece v. Scoggins, 506 F.2d 967 (5th Cir. 1975). This court is of the opinion that Reece is controlling over this matter. Section 6335, allowing the sale of a taxpayer's land to satisfy a tax deficiency, must be strictly construed. Id., at 871. Governmental seizure and sale of land is a potent weapon and is generally only available as a last resort. Id. Due to the harsh consequences, Congress has imposed precise measures which are designed to protect the taxpayer, and "absent literal compliance with its provisions, the government sale of land should not stand." Id.

The United States contends that the mailing of the notice satisfies the statute in that it satisfies its ultimate goal - - notify the taxpayer and provide him with an opportunity to be present at the tax sale.[3] Consequently, the defendant alleges Reece is distinguishable from the instant case. This Court disagrees. Not only does the language of the statute specifically address the only two situations where mailing is appropriate, the Fifth Circuit in Reece also contemplated the problem and chose to track the specific language of the statute.

> In this case, the landowner never received written notice of the sale by any of the specified methods. While the IRS agent went to Reece's home, he did not deliver written notice or leave it at the taxpayer's home or place of business. The mailing of notice, even if done in a timely fashion, satisfies the statute only if the taxpayer has no dwelling or place of business within the revenue district.

Id. (emphasis added).

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[3] This court is not convinced that the Notice of Sale was mailed to Mrs. Bretz in that she directly contests this point in her affidavit, as well as the fact that the United States failed to supply this Court with the return receipt indicating Mrs. Bretz' acceptance. However, regardless of whether or not the Notice of Sale was receiveed through certified mail, the outcome of this matter remains the same.

For these reasons, even assuming the Notice of Sale was timely mailed and received by Mrs. Bretz, this Court is of the opinion that defendants did not strictly comply with the statute as prescribed by Reece. Consequently, plaintiffs' motion for summary judgment must be granted. It is, therefore,

ORDERED that Plaintiffs' motion for summary judgment be GRANTED. It is, further,

ORDERED that the certificate of sale is VACATED. It is further,

ORDERED that the Directors Deed is VACATED. It is, further,

ORDERED that the purchasers of the land are to release the property to plaintiffs upon the refund of their purchase price by the United States. It is, further,

ORDERED that Plaintiffs Robert and Rudy Bretz are herby owners of the property in question upon the completion of the purchase price refund.

Attorneys' fees were also requested by plaintiffs. However, they failed to attach an affidavit to support a reasonable fee incurred. Consequently, no attorneys' fees will be awarded at this time, but the Court will entertain a subsequent motion with the proper attachments.

SIGNED this 1st day of March, 1991.

William M. Steger
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION

EXHIBIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORVILLE R. GOODWIN,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA; CALVIN E. ESSELSTROM; JOSEPH PHILLIPS,
Defendants-Appellees.

No. 90-15192
D.C. No.
CV-89-20333-SW
OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer M. Williams, District Judge, Presiding

Argued and Submitted
March 11, 1991—San Francisco, California

Filed June 11, 1991

Before: Richard H. Chambers, Robert R. Beezer and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Beezer

Goodwin Court -

Ta:

Exhibit -

The court of appe
district court judgm
property by the IRS
failure to strictly co
U.S.C. § 6335.

¶ 25 & 26

Appellant Orville R. Goodwin failed to pay payroll taxes, and the IRS filed a notice of lien on his interest in a residence. Agents went to the house to deliver a notice of levy and seizure. He was not there, and they mailed the notices to him by certified mail. A sale was held, and the house was sold to the government. Goodwin sought a court order restraining the government from selling the property. He also filed a lis pendens, thereby providing constructive notice to subsequent purchasers of the pendency of his action. The government granted summary judgment for the government, concluding that the requirements of § 6335 had been met. Goodwin appealed.

[1] The government contended the appeal was moot for Goodwin's failure to obtain an order enjoining the sale pending appeal and [2] that the filing of a lis pendens does not substitute for a stay. [3] While this court cannot grant relief on the request that the district court enjoin the sale, the court can determine the validity of the seizure and lien foreclosure sale. [4] Goodwin's appeal is not moot because the filing of the lis pendens renders this court's judgment enforceable against any subsequent purchaser or encumbrancer.

[5] The government contended a literal reading of § 6335 (requiring personal service or written notice left at his usual abode) was not necessary, since he could not show lack of actual notice. [6] The extraordinary powers granted to the government in levying, seizing, and selling property are dependent on strict compliance with the procedures prescribed by statute. [7] Further, because the statute requires strict compliance, Goodwin did not have the burden of demonstrating prejudice. [8] Accordingly, as between Goodwin and the government, the seizure and sale of the property was invalid.

COUNSEL

David M. Kirsch, San Jose, California, for the plaintiff-appellant.

Steven W. Parks and Kenneth L. Greene, United States Department of Justice, Tax Division, Washington, D.C., for the defendants-appellees.

OPINION

BEEZER, Circuit Judge:

Orville R. Goodwin appeals the district court's summary judgment order which upheld the government's seizure and sale of his property for delinquent payroll taxes. Goodwin contends that the seizure and sale should be set aside because the government did not literally comply with the notice requirements of 26 U.S.C. § 6335. He also contends that the district court erred by ruling that the statute of limitations had not expired prior to seizure of the subject property.

I

In 1974, Goodwin failed to pay payroll taxes amounting to $34,704.98. On July 12, 1976, the Internal Revenue Service (IRS) assessed those taxes, and on July 27, 1976, the IRS filed a notice of federal tax lien on Goodwin's undivided one-half interest in residential real property located at 1709 Gladstone Avenue, San Jose, California (the Gladstone property). From 1976 to 1985, Goodwin entered into various agreements with the IRS to pay the taxes in installments but failed to make any payments. He also signed four separate waiver forms which extended the statute of limitations for collecting the taxes. The last waiver expired on December 31, 1990.

On April 9, 1985, two IRS agents went to the Gladstone property and attempted to deliver a notice of levy and seizure. Goodwin was not there so they mailed the notices by certified mail. Goodwin contacted the IRS, promised to pay the taxes, but made no payments.

On June 19, 1986, the IRS mailed Goodwin a Seizure and Sale Worksheet that stated that the minimum bid price for the Gladstone property would be $32,859.37. Goodwin promised to pay the minimum bid price by July 15, 1986, but made no payment. On July 16, 1986, the IRS posted a Notice of Public Auction Sale to be held on August 5, 1986.

The sale was held, but no bidders appeared. The property was declared sold to the United States at the minimum bid price, pursuant to 26 U.S.C. § 6335(e)(1)(C). On March 24, 1987, the District Director's Deed to the Gladstone property, which had been executed pursuant to 26 U.S.C. § 6338(c), was filed with the Santa Clara County Recorder's Office. On May 26, 1989, Goodwin filed a complaint in district court seeking an order restraining the government from selling the Gladstone property. He alleged that the seizure and sale were invalid because of defective service and because the statute of limitations on the government's right to seize the property had expired.

The district court found that the notice received by Goodwin was sufficient and refused to issue the restraining order. On September 27, 1989, the district court granted the government's summary judgment motion. The court ruled that serving the notices by certified mail satisfied the requirements of § 6335 and further ruled that the statute of limitations had not run.

Goodwin did not seek a stay of the district court's rulings, and on October 10, 1989, the IRS sold the property to a third party. Goodwin timely appealed the summary judgment order, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

II

[1] Initially we must determine whether the sale of Goodwin's property to a third party has rendered Goodwin's appeal moot. The government contends that Goodwin should have

obtained an order from this court enjoining the sale of the Gladstone property pending appeal in order to preserve his rights on appeal. According to the government, once a quitclaim deed was issued to a third party pursuant 26 C.F.R. § 301.7506-1, Goodwin's opportunity for appellate relief in this court was foreclosed.

Goodwin counters with the fact that he filed a Notice of Pendency of Action (lis pendens) prior to the recording of the quitclaim deed. He contends that the timely filing of the lis pendens preserved his rights to pursue this appeal.

Under California law, the timely filing of a lis pendens provides constructive notice to any subsequent purchaser or encumbrancer that a judgment in the pending action will be binding as against them. *See Putnam Sand & Gravel Co. v. Albers*, 92 Cal. Rptr. 636, 638 (1971). "A judgment favorable to the plaintiff relates to, and receives its priority from, the date the lis pendens is recorded, and is senior and prior to any interests in the property acquired after that date." *Stagen v. Stewart-West Coast Title Co.*, 196 Cal. Rptr. 732, 737 (1983).

[2] The government cites *In Re Onouli-Kona Land Co.*, 846 F.2d 1170 (9th Cir. 1988) and *In Re The Brickyard*, 735 F.2d 1154 (9th Cir. 1984), as authority for its contention that the filing of a lis pendens simply provides notice of a pending action but does not substitute for obtaining a stay pending appeal. Both cases, however, are concerned with the effect a lis pendens has on a sale in bankruptcy in light of the mootness rule in 11 U.S.C. § 363(m).

There is no similar mootness provision in the Internal Revenue Code, and thus our analysis is limited to "whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Stevedoring Services of America v. Ancora Transport*, 884 F.2d 1250, 1253 (9th Cir. 1989). Goodwin's action in district court requested both injunctive relief and a judgment to quiet title through a finding that the seizure and sale of the Gladstone property were invalid.

[3] Goodwin's failure to attempt to preserve the status quo pending appeal has forestalled our ability to grant relief on his request that the district court enjoin the government from selling the Gladstone property. However, we may still determine the validity of the seizure and lien foreclosure sale through which the government obtained a District Director's Deed pursuant to 26 U.S.C. § 6338(c). *See Kulawy v. United States*, 917 F.2d 729, 733-734 (2d Cir. 1990) (government's sale of automobiles to third party did not moot first party's action against the government to quiet title to those automobiles). This action was correctly instituted under 28 U.S.C. § 2410(a)(1) to quiet title to the Gladstone property. We find "nothing in § 2410(a)(1) that permits the government to oust the court of jurisdiction validly invoked." *Id.* at 734.

[4] Goodwin and the government are before us on appeal. Goodwin filed a timely lis pendens that will render our judgment enforceable against any subsequent purchaser or encumbrancer. Goodwin's appeal of the district court's grant of summary judgment against his action to quiet title is therefore not moot.

III

We review de novo the district court's grant of summary judgment. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990). We also review de novo the district court's interpretation of 26 U.S.C. § 6335. *See Batchelor v. Oak Hill Medical Group*, 870 F.2d 1446, 1447 (9th Cir. 1989).

Goodwin contends that the seizure and sale of his property was invalid because the IRS failed to comply with the service requirements of § 6335. The requirements in relevant part are as follows:

> *§ 6335. Sale of seized property*
>
> *(a) Notice of seizure.*—As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property, . . . or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. . . .
>
> *(b) Notice of sale.*—The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a) . . . .

26 U.S.C. § 6335 (1988).

[5] The government concedes that under a literal reading of § 6335, service by certified mail, as received by Goodwin, is defective. A literal reading requires the government to have personally served a written notice to Goodwin or to have left the written notice at Goodwin's usual place of abode. The government contends, however, that a literal reading of § 6335 is not required. According to the government, Goodwin cannot demonstrate a lack of actual notice, and therefore he cannot show prejudice resulting from the de minimis noncompliance.

[6] The Second Circuit, in *Kulawy v. United States*, 917 F.2d 729 (1990), recently addressed the question whether there must be strict compliance with the notice requirements of § 6335. The Second Circuit held that the extraordinary powers granted to the government of levying, seizing and sell-

ing property for tax collection purposes without prior judicial hearing are dependent upon strict compliance with the procedures prescribed by statute. *Id.* at 734.

Although the notice provision considered by the Second Circuit in *Kulawy*, 26 U.S.C. § 6335(d), concerned notice to potential buyers rather than notice to the property owner, we find the reasoning in *Kulawy* persuasive on the question before us. The concern with ensuring notice to potential purchasers surely could be no greater than the concern with ensuring notice to the property owner that his property is in jeopardy.

Thus, the necessity for complying with § 6335(d) could be no greater than the necessity for complying with §§ 6335(a) and 6335(b). In following the Second Circuit, we hold that the language and purpose of § 6335(a) and § 6335(b) require that the government be held accountable for failure to strictly comply with the procedures prescribed by the two provisions. *See Kulawy*, 917 F.2d at 735.

[7] Moreover, because § 6335 requires strict compliance, Goodwin did not have the burden of demonstrating prejudice. *Cf. id.* As the Second Circuit noted, the government insists that taxpayers strictly comply with statutory requirements in quiet-title actions. *See Colorado Property Acquisitions, Inc. v. United States*, 894 F.2d 1173, 1174-1175 (10th Cir. 1990). "A stickler for enforcing the statutory notice it is entitled to receive, the government should be no less punctilious with respect to the statutory notice it is required to give." *Kulawy*, 917 F.2d at 735.

In *Reece v. Scoggins*, 506 F.2d 967 (5th Cir. 1975), the Fifth Circuit also addressed the issue of whether § 6335 must be followed literally. As in the instant case, the plaintiff in *Reece* had received actual notice of the seizure and sale. The government, however, had not served the plaintiff in person or left written notice at his usual place of abode as was required by § 6335. The Fifth Circuit required strict compliance with § 6335. *Id.* at 971. Applying reasoning that was adopted by the Second Circuit in *Kulawy*, the Fifth Circuit held that § 6335 is "clear and mandatory" and that "absent literal compliance with its provisions, the government sale of land cannot stand." *Reece*, 506 F.2d at 971.

[8] Although we would not apply a literal reading of a statute that required a result demonstrably in conflict with the drafter's intentions, no such apparent conflict exists here. *Cf. United States v. Locke*, 471 U.S. 84, 93 (1985). Congress has set forth precise requirements for notice of seizure and sale of property in tax deficiency situations. "[W]hen the government seeks to enforce the laws, it must follow the steps which Congress has specified." *Reece*, 506 F.2d at 971. The government did not give Goodwin the notice required by § 6335. Accordingly, as between Goodwin and the government, the seizure and sale of the Gladstone property was invalid.

IV

Goodwin also contends that the district court incorrectly granted summary judgment on the issue of whether the statute of limitations had expired on the government's right to seize and sell the Gladstone property. Goodwin alleges that the statute of limitations issue was not before the district court on the government's motion for summary judgment, and thus the district court should not have reached that issue.

A review of the record indicates that the government moved for summary judgment as to the entire action rather than for a partial summary judgment that was limited to the validity of the notices. Goodwin raised the statute of limitations issue in his complaint, and that issue was put before the district court when the government moved to dismiss the entire action. The government's motion for summary judgment incorporated earlier papers that had addressed the statute of limitations issue. These papers included the declarations of a revenue agent who stated that Goodwin had signed tax collection waiver forms which extended the statute of limitations for the seizure and sale of the Gladstone property.

The statute of limitations issue was raised in the government's motion for summary judgment, and Goodwin failed to raise any material issues of fact in opposition to the motion. The district court, therefore, did not err in granting summary judgment in favor of the government on the issue of whether the statute of limitations had expired.

V

Finally, Goodwin requests attorneys' fees and costs pursuant to 26 U.S.C. § 7430. He is entitled to fees and costs under this provision only if he is able to show that the government's position in this proceeding "was not substantially justified." 26 U.S.C. § 7430(c)(2) (1988). Goodwin has failed to make such a showing, therefore, he is not entitled to any fees or costs on appeal.

VI

Goodwin's appeal of the district court's order of summary judgment against his action to quiet title to the Gladstone property is not moot. The seizure and sale of the Gladstone property to the government pursuant to 26 U.S.C. § 6335(e)(1)(C) was invalid due to defective notice. The district court correctly granted summary judgment in favor of the government on the issue of whether the statute of limitations had expired on the government's right to seize and sell the property. Goodwin is not entitled to attorneys' fees or costs on appeal.

REVERSED in part; AFFIRMED in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAYMOND J. VAN SKIVER, et uz,
Plainfiff,

v. Case No. 89 - 1470 - C

UNITED STATES OF AMERICA, et al.,
Defendant.

MOTION TO RECONSIDER

COMES NOW the Plaintiff to Move the Court to Reconsider its Order of Summary Judgment as was made in favor of Defendant.

In support thereof Plaitiff will show as follows :

Dated this 31st day of July, 1990
@ 10 ; 58 AM – as the clerks' stamp so indicated - - -

Raymond J. VanSkiver, Pro per
% 2220 N. Cedar Crest Dr.
Wichita, Kansas
(316) 722 - 9299

CAUSE TO MOVE THE COURT TO RECONSIDER

1. Plaintiffs' cause to Move the Court to Reconsider its Order of Summary Judgment of July 16, 1990,*, as handed down in favor of Defendant, left questions concerning the procedural defects of two mandatory procedures, Plaintiffs' action to Quiet Title centers on what did take place. \Thus, the mandated due process was not fulfilled by the Internal Revenue Service employees.

2. This Court seemingly has taken the position that unless Plaintiff can produce affidavits as to what did not take place, places Plaintiff in the position of proving the negative by requiring Plaintiffs' to Attest to what did not happen. However, in the case of Weiland v US, 87 - CV - 10368 - 88, US District Court, Eastern District of Michigan, Northern Division, Judge James P. Churchill's added notation properly addresses the merits of Defendants' alleged Affidavits :

> "Although the United States did submit the Affidavit of Attorney Bridget Rowan to support its Motion, the Court finds this document to be of no real significance. This issue is discussed more fully in Section II of the Court's Memorandum Opinion." (as follows :
>
> "Assuming that Plaintiff Weiland can state a cognizable claim regarding procedural defects, the United States can obtain Summary Judgment simply by proving compliance with the relvant statutory procedures. Cf Bermas 825 F.2d @ 1055 (discussing 26 USC 6303 (a)). On the present record, however, the Court simply has no basis for presuming compliance with the mandatory procedures.

---

*3 : 16 PM – as the Clerks stamp so indicated - - -

3. Here, Plaintiff has shown on the Record that both the Weiland and Berman Court did not require the Plaintiff to prove the negative, but rather, established that : "the government could obtain Summary Judgment simply by proving compliance with relvant statutory procedures. Which is just what Plaintiff has been trying to accomplish.

4. Time and again, Plaintiff has requested of the Secretary to furnish Plaintiff a copy of the assessment . . . NO VALID Assessment has ever been furnished Plaintiff ! However, the government's reply only went on to establish that NO VALID assessment has ever been in existance, at least as far as Sec. 301.6203 - 1 is concerned.

5. The Weiland and the Berman Courts only asked for a cognizable claim regarding procedural defects and Plaintiffs have made cognizable claims and have also shown on the Record as was entered by both the Plaintiff and the Defendant evidence which established beyond any doubt that Due Process was not adhered to by the Defendant concerning :

1. That Mandated Assessment ;
2. That highly questionable Form 4340 ;
3. That Mandated Notice – 26 USC 6335 (a) & (b).

> "It is the Government's burden to show that an assessment has been made. To require that the taxpayer 'contradict' the evidence of the internal records of the IRS that a notation was made on [the computer] record would place an unsurmountable burden on the taxpayer while the government could prove a vails assessment merely by submitting a summary record signed by an assessment officer – a document prepared by the IRS and in their control."
>
> Brafman v US, 384 F.2d 863 (5th Cir., 1967)

> "Any doubt as to the persons or property intented to be included in a tax statute will be resolved in favor of the taxpayer."
>
> Miller v Illinois C.R.Co., 146 Miss 422

6. THEREFORE, this Motion to Reconsider is directed at the fact that much doubt remains as to why this Court entered its verdict in favor of the government when all the government introduced on the record was "Hearsay spowned in Hearsay". Thus, Plaintiff will attest as to those points that remain in doubt and unresolved :

THAT MANDATED ASSESSMENT

1. The Government filed its Motion For Summary Judgment and attached various documents purporting to be "admissible" evidence. Among such documents be a "Form 4340[1], better known as an interpretation of the computer's code of a taxpayers account. Coupled with affidavits alleging that said "Form 4340" establishes that mandated assessments and notice and demand were, in fact, sent to Plaintiff.1

2. In contrast to Defendants "Exhibits" as entered in support thereof is the question of Mandated procedures [301.6203 - 1] concerning the making and signing of Assessment and Notices pretaining thereto. [Said Notice will be discussed in greater detail below in "26 USC 6335.

---

[1] For newly discovered evidence See Raymond V. Price, Disclosure Officer letter stating that " Form 4340 is no longer used". p. 90.a

3. FIOA evidence was entered on the Record to establish that Plaintiff had on various occasions, 1982, 1984 and 1990 made written requests for the Mandated copies of said assessments as Section 6203 provides, only to be informed that : "Form 4340 is the ONLY record of assessment we have which identifies you . . ."

4. Also, included within that FOIA evidence was a Form 23C as requested for the years of 1975 through 1985, which was properly signed by the assessment officer – – however, Plaintiff was not named thereon, nor could Plaintiffs' assessment be determined therefrom.

5. By way of explaination for this obvious void, a letter addressed to Mr. Jones, dated February 16, 1990, as mailed from the Internal Revenue Service, Ogden, Utah, and attached hereto, states that : "Form 23C is no longer used . . ." then continuing, "please be advised that Form 17 A is obsolete. This particular Form has been replaced by computer generated notices which are automatically forwarded to the taxpayer upon determination of assessment. Further, the Service does not maintain a paper record of these notices and therefore, no copies of notices pertaining to you exist at the Ogden Service Center."

6. The process described above fails to mention just how, or when, that assessment is signed, it ever, or by what process the assessment is validated, or if it ever was validated before being forwarded to the taxpayer, or who attested to having a personal knowledge of the preparation thereof, or how the evidence was preserved without bene-

fit of that required written entry, or that the Assessment was actually mailed to Plaintiff.

7. In connection with said taxation, the assessment is to ascertain the amount that each taxpayer is to pay. State v New York, 22 A 765, 768. An "assessment" is, from its legal requirement, and the necessity of preserving its evidence, a written entry, and must depend upon the records of the commissioners office, and not upon parol testimony, or the private duplicate of the assessor. It is the "assessment" which confers the power to sell, in the same manner as a judgment on which an execution is issued.

8. It is the "assessment", therefore, which contain the means of identification of the ownership in order that the properietor may pay his tax, or redeem, it he fails to pay in time. Norris v Delaware, 66 A 1122, 1125. Thus, an "assessment" is a prescribed procedure for officially, recording fact and amount of a taxpayers' adminstratively determined tax liability. Cohen v Gross, 316 F.2d 521 (3rd Cir. 1963)

9. The statute and regulation mandated are clear on their face and the actual date of signing by the assessment officer is the date of assessment, and the summary record sheet or list posted to that sheet must contain the taxpayers' name, address, the amount of the tax, the type of tax and the taxable period. See 6203. These requirements were succinctly stated in Brafman v US, 384 F.2d 863 (5th Cir. 1967) @ 867 and follows :

> "It appears to us that the requirement of the applicable Treasury Regulation – that an assessment officer sign the assessment certificate – is consistant with the literally mechanical procedures for recording of liability. The recordation is to be accomplished through "machine operations", but the actual and final assessment step, that step which establishes a prima facie case of taxpayer liability (26 C.F.R. 601.104), can be taken only with the approval of a responsible officer of the Internal Revenue Service. The Government may want to postpone assessment in certain cases because of the limitations on collection and lien perfection that begin to run at the time of assessment. This might be accomplished, after the computers have run their course, only by the assessment officer refusing to sign the already prepared certificate. What is important in any case is that assessment is not automatic upon recordation; it requires the action of an assessment officer. That action, as defined explicitly in the Treasury Regulation, is the signing of the certificate."
>
> "And until the assessment has been made [signed] the tax has not been found to be owing."
>
> In re Western Trading Co. 310 F.Supp. 1130 (1972)

10. Missing from Defendant document / Affidavits is that required / mandated and/or personal knowledge of the assessment certificate by the assessment officer which must be affixed to the assessment before the tax can be found to be owing as noted in IR Manuel 5312 (1) MT 5300 (11 / 15 / 85) .

> "The assessment is made by an assessment officer designated by the District Director or Service Center Director as appropriate. The Assessment Officer Signs

> a Form 23C Assessment Certificate and this record through supporting data provides identification of the taxpayer by name and number, the taxable period, the nature of the tax, and the amount assessed."

11. Also, in the case of Joyce v US, 329 F.Supp. 1242 (W.D. Penn. 1971) the Court was faced with an assessment officer adding the wife's name to a tax assessment originally made against her husband. However, in that case, the Court found that the assessment was Void because the statutory mandate was not followed :

> "The Court has conducted full and complete hearings and it appears that it is not in dispute that the assessments originally made were against the husband and subsequent thereto the name of the wife was added, which action was improper and not consistant with rules promulagated by Internal Revenue Service.
>
> "The procedure for assessment provides, inter alia, that the assessment officer shall sign the summary record of assessments made against any taxpayer, that said action, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period as applicable, and the amount of the assessment. The date of the assessment is the date the summary record is Signed by an assessment officer. 26 U.S.C.A. 301.6203 - 1. Code of Federal Regulations. Since this procedure was not followed, the assessment is Void and the executions based thereon are invalid."

12. And agreeing therto is Mulroney's Federal Tax Examinations Manual, 1986, Section 12.4 (a) Assessment Process which clearly points out that :

> "An assessment occurs when a Revenue Service Assessment Officer Signs a summary record which is supported by a list that identifies the taxpayer, the type of tax, the amount assessed, and the taxable year or period to which it relates. The assessment date is the day on which the summary record is Signed."

13. This Court failed to address the Governments' failure to furnish Plaintiff with a Signed assessment, either before Notice of Deficiency or when Plaintiff made a 6203 or FOIA request.

14. In view of this fact that the Ogden letter stipulated that NO paper record is maintained, and that said Notices were, in fact, automatically forwarded to the taxpayer, it is highly impropable that said "assessment" was ever given any opportunity to be signed by an Assessment Officer as mandated.

15. Therefore, Plaintiff is entitled to Summary Judgment based upon Defendant's failure to produce on the Record a Signed Summary Record.

4340 – "HEARSAY SPAWNED IN HEARSAY"

1. "What the computer says is blatant hearsay." Jefferies v State, 640 S.W.2d 854 (Tenn. Crim. App. 1979).

2. The Government filed for Summary Judgment and attached various documents purporting to be admissible evidence to prove its case, including declarations attested to by Revenue Officers and Forms 4340 Certificate of Assessments and Payments. Whereupon, Plaintiff entered its Motion to Strike based on the argument that no opportunity had been afforded to Plaintiff to "cross-examine" and that no foundation had been laid by defendant as required by Federal Rules of Civil Procedure 56 (e). Rule 56 (e) provides that :

> "Supporting affidavits shall be made on personal knowledge, shall set forth such facts as would be assmissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attach ed thereto or served therewith . . ."

3. Notwithstanding Defendant's attached affidavits and/or declarations, the Affiants must have had a personal knowledge of the subject matter. Rule 56 (e), which therefore means knowledge of the truth in regard to a particular fact and/or allegation; which is original, and does not depend on information or hearsay.

4. Contrary to rule 56 (e), the Governments Affidavits merely state that the Affiants only had access to the IRS Computer Transcript and acknowleged that said transcript shows that the assessment and required Notices were properly executed.

5. Therefore, the Affiants testimony does not comply with Rule 56 (e) Summary Judgment requirement since said testimony is not based upon personal knowledge. See e.g. Turoff v May Co., 531 F.2d 1357 (6th Cir.1976) CMS Industries, Inc. v IL.P.S. Intern., Ltd., 643 F.2d 289 (11th Cir. 1981); Maiorana v MacDonald, 596 F.2d 1072 (1st Cir. 1979); US v Bosurgi, 530 F.2d 1105 (2d Cir. 1976); Rossi v Trans World Airlines, Inc., 507 F.2d 404 (9th Cir. 1974); Toensing v Brown, 374 F.Supp. 101 (D.C.Cal. 1974). aff'd 528 F.2d 69 (9th Cir.); Council v Volpe, 584 F.2d 870 (10th Cir. 1973), Cert. denied, 416 US 936, 94 S.Ct. 1935) 40 L.Ed.2d 286; Echaide v Confederation of Canada Life Ins., 459 F.2d 1377 (11th Cir. 1972); De Pinto v Hamilton, 298 F.2d 459 (1st Cir. 1962); US v Crispen, 622 F.Supp., 75 (D.C.Ill. 1985); Taylor v. Collins, 574 F.Supp. 1554 (D.C.Mich. 1983); Lowe v Philadelphia Newspapers, Inc., 594 F.Supp. 123 (D.C. Pa. 1984); Mabey v Reagan, 376 F.Supp. 216 (D.C. Cal. 1974).

6. The Rule 56 (e) requirement that supporting and opposing affidavits be made on personal knowledge is mandatory. US v Bosurgi, supra.

7. The Affiants have attested as to the admissibility of Form 4340, however, in a recent case of US v Hesse, 90 - 1 U.S.T.C. 50049 (S.D.N.Y. 1990). the Court ruled;

> "The Certificate of Assessment and Payment [Form 4340] is secondary evidence of the date on which the assessment of the Hesses took place. While the parties disagree as to the details of how the certificate of assessments and payments is prepared, it is clear that a form is drafted when the assessment re-

> quest is made. The form or information from the IRS journals is then entered into a computer, and when a certificate of assessments and payment is requested, the information to be put on the certificate is retrieved from the computer. Because the certificate of assessments and payments is derived from other documentation which indicated the date when the assessment took place, it is secondary evidence of the fact."

8. And in US v Hudson, 977 F.2d 251 (9th Cir. 1972), a draft evasion case involving the use of public records to prove the commission of the offense, the court held that the public records exception to hearsay wasn't designed to permit double hearsay : "The author of the challenged entry must possess personal knowledge of the evidence stated therein." 479 F.2d 253

9. Alleged public record which are summaries of other events fail to qualify as real public records. In Jung Jim Teung v Dulles, 229 F.2d 244 (2nd Cir. 1953), certain aliens had filed suit seeking a declaratory judgment regarding their citizenship, but had suffered an adverse summary judgment. On appeal, they challenged the admissibility of the evidence used by the government in support of its motion. Such evidence being an affidavit of the U.S. Attorney which had appended to it various "Status Reports of Pending Cases." In holding this evidence inadmissible, the court held :

> "These 'Status Reports' would not be admissible as official records since it does not appear that they relate to matters within the personal knowledge

of the person who made the records and as to which they could testify . . . nor are they admissible under 28 USC 1732 as records made in the regular course of business as they appear to be reports made for the specific purpose of this litigation." 229 F.2d @ 247.

10. Also, for the Government to assert that Form 4340 is admissible evidence is without merit as Federal Rules of Evidence Rule 902 (1) & (4) certification procedure extends only to public records, reports and recorded documents. A public record is any compilation of information authorized by law to be recorded in a public office. See J. Weinstein, and M. Berger, Weinstein Evidence, Section 901 - 94, 95, 1975. Form 4340 is not a public record, report or recorded document since it is only an undisclosed individuals interpretation of the computer codes contained within the Service's Automatic Data Processing system on the Master File.

11. Under Rule 902 (4) the custodian must prepare a certificate stating that he has custody of the original record, report, entry or document and attach a true and correct copy . . . See e.g., Amoco Production Co. v U.S., 619 F.2d 1383 (10th Cir. 1980)

12. The Governments Affiants did not have "custody" of any public record as they attested to the fact that they merely were reviewing computer data from the IRS master computer. The fact is that the Governments' Affidavits concerning Form 4340 is, in fact, false "evidence" as Form 4340 is neither business nor official records which could be certified for admission under Rule 902 and specifically are not admissible under Rule 803 (6) or (8).

13. Generally, to be admissible as a "business record", the document in question must, among other criteria, have been made at or near the time of the event in question. Form 4340 is normally dated several years after the alleged events. In the instant case, as long as 9 years. More importantly, a "business record" must actually be a "business" record and not merely some record made in anticipation of litigation. Notwithstanding Defendants' contentions to the contrary, Form 4340, as entered on the Record by the Government, is not admissible under Rule 803 (6) because they were not made at, or near the time in question, but were clearly made in preparation for this litigation. See Palmer v Hoffman, 318 US 109, 63 S.Ct. 477 (1943).

14. In support, Pecker X - Ray Corp. v Frerker, 405 F.2d 916 (8th Cir 1969), certain incident reports and letters written to document a surgical procedure which ultimately became the subject of a civil action were held inadmissible as having been prepared for litigation. See also US v McPartlin, 595 F.2d 1321 (7th Cir. 1979), Paddack v Dave Christemen, Inc., 745 F.2d 1254 (9th Cir. 1984); US v Miller, 771 F.2d 1219 (9th Cir. 1985); US v Bohrer, 807 F.2d 159 (10th Cir. 1987); Johnson v US, 780 F.2d 902, 909 (11th Cir. 1986).

15. Still further, a document which untimely memorializes a transaction in question cannot be submitted as a business record under Rule 803 (a), US v Lemise, 720 F.2d 1327 (D.C.Cir. 1983) etc. Forms 4340 were created for litigation several years after the alleged events.

Therefore, the governments evidentiary submissions are not admissible under Rule 803 and Plaintiffs' Motion to Strike should have been upheld.

26 USC 6335 (a) and (b)

1. 26 USC 6335 (a) and (b) is discussed here in light of the Court's over-looking the Plaintiffs' claimthat the Defendant did not personally deliver Said Notices of Seizure and/or Sale to Plaintiff as mandated.

2. Thus, when Defendants came forword with Mr. Tincher's Affidavit that Said Notice of Sale had, in fact, been "mailed" by certified mail, doubt had been established on the Record and partial summary judgment should have been granted since 26 USC 6335 (b) mandates that Said Notice of Sale was to have been personally served on the taxpayer.

3. In this light, Plaintiff had properly asked that said affidavit be Struck pursuant to Rule 56 (f) of the Federal Rules of Civil Procedure as an alternate response to Defendants's Motion for Summary Judgment. But this Court failed to accept the doubt that had been raised with Mr. Tincher's Affidavit.

UNDISPUTED FACTS SURROUNDING MR. TINCHER'S AFFIDAVIT

1. This action was brought to Quiet Title to Plaintiff's Real and Personal Properties as alleged seized / sold by Defendant. However, the government failed to properly serve Plaintiff with the required Notice of Seizure

and/or Notice of Sale as required by 26 USC 6335 (a) and (b).

2. Plaintiffs' verified complaint filed with the Court contended that the United States erroneously and Illegally siezed / sold Plaintiffs' Real and Personal Property within the meaning of 26 USC 6335 and 26 C.F.R. 301.6335 - 1, since it had failed to personally serve Plaintiffs with that required Notice of Seizure and Notice of Sale within the precise strictures of IRCode Sections 6335 (a) and (b).

3. It is true that Defendant did personally serve Mr. VanSkiver with Notice of Seizure of 34 lots. But not true with the property at 2601 N. Cedar Crest Drive, Sedgwick County Kansas.

4. However, it is not true that Plaintiffs were personally served with any Notice of Sale on either property groups. This was attested to by Defendants' own affidavit as to the 34 lots, but Defendant has failed to even address Plaintiffs' Complaint concerning 2601 N. Cedar Crest Drive. Plaintiffs could seek an Affidavit from the resident to verify what took place, but Plaintiff is not inclined to involve others in this matter.

ARGUMENT

1. Plaintiff is entitled to Partial Summary Judgment in its favors since the United States failed to comply with the Notice requirement of 26 USC 6335 (a) and (b).

2. The Summary Judgment General Rule is that : "The moving party for a Summary Judgment has a heavy burden of persuasion, since a Court should not lightly deprive a party of rights to trial or to dispute a material issue." Percival v. General Motor Corp., 539 F.2d 1126 (8th Cir. 1976); Dwarman v Mayor and Board of Alderman, et., 370 F.Supp. 1056 (D.C.N.J. 1976).

3. The Summary Judgment sought by defendant was supported with affidavits which in fact, clearly established that Said Notice of Sale was not personally served upon Plaintiff as mandated by 6335 (a) and (b).

> "Governmental seizure and sale of property is one of the most potent weapons in the governments' tax collection arsenal. The consequences of seizure and sale are often staggering and irreversible. In this vain, Congress has imposed precise strictures on the Notice requirements under Title 26 USC 6335, the Section 6335 Notice requirements are designed to protect the taxpayer." Reece v Scoggins, 506 F.2d 967 (5th Cir. 1975).

> "It is held that strict compliance with statutory provisions is required to validate tax sales."
> Silver Bell Industries, Inc., v US, 76 - 1 U.S.T.C. 9432 (10th Cir. 1976); Margiotta v. District Director, 214 F.2d 518 (2nd Cir. 1954); Johnson v. Garllan, 470 F.2d 1104 (4th Cir 1973); Douglas v. US, 562 F.Supp. 593 (D.C.Ga. 1983); Howard v. Adle, 538 F.Supp. 504 (D.C.Mich. 1982); In re Dunn Trucking Co., 32 B.R. 182 (Bkrtcy. Iowa 1983); Jones v New Pittsbury Courier Pub. Co., 364 A.2d 1315 (Pa. 1976), cert denied, 430 US 984, 97 S.Ct. 1680, 52 L.Ed.2d 378.

"Failure on the part of the government to comply with the precise strictures of the notice requirements of Section 6335 voids the sale."
Aqua Bar & Lounge v US, 438 F.Supp. 655 (E.D. Pa. 1977); Ringer v Basile, 645 F.Supp. 1517, 1524, (D.Colo. 1986).

4. It should be noted that the Tenth Circuit in Silver Bell Industries and the Fifth Circuit in Reece, both Courts quoted the Supreme Court in the case of Thatcher v. Powell, 19 US 54, 56; ". . . the person invested with such a power [of sale] must pursue with precision the course prescribed by law, or his act is invalid . . ."

5. More specifically, in the Reece case, an IRS agent served Notice on Reece that the IRS had seized the property in question because of his failure to pay certain income taxes. During the next two weeks, said agent twice visited Reece's home to give him Notice of public auction sale of said seized land but found no one at home. Thus, departed without leaving any written Notice at the taxpayer's residence. The agent then published Notice of Sale in a newspaper circulated in Butts County and also posted similiar Notices at the Court House and various other locations in the county. A certified letter containing Notice of Sale was also delivered to Reece's residence.

6. In spite of all this effort the Reece Court ruled that : "The mailing of Notice, even if done in a timely fashion, satisfies the statute only if the taxpayer has no dewelling or place of business within the revenue district."
506 F.2d @ 971

7. Thus, the Reece Court concluded that once a Court finds that the prescribed method was not followed, the Court must invalidate the Sale : "The language of the section (6335) is clear and mandatory; absent literal compliance with its provisions, the government sale of land cannot stand." 506 F.2d 971

8. Defendants' affidavits, as placed in evidence, admitted that Said Notice of Sale was sent by certified mail, and not delivered in person as required within 26 USC 6335 (b) which mandates that :

> "As soon as practicable after seizure of property, Notice in writing shall be given by the Secretary to the owner of the property (or, as the case of personal property, the possessors thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address."
>
> Also, "The Secretary shall as soon as practicable after seizure of property give Notice to the owner, in the manner prescribed in Subsection (a)."

9. Further, after levy, but before sale, a notice of seizure and a notice of sale must be served upon the owner or holder of rights to have a valid sale. Failure of, or defect in either Notice causes the sale to be invalid. See : In re Dunne Trucking Co., 32 B.R. @ 187 citing Johnson Gartlan, 334 F.Supp. 438 (1971) rev'd on another issue, 479 F.2d 1104 (1973); Reece, 506 F.2d 967 (1975).

10. Reflecting on the mailing of Notices, in the case of Howard v Adle, Supra, the United States admitted that it was required to provide Notice of Sale to Plaintiffs in compliance with the first sentence of Section 6335 (a). but argued that the statutory language includes certified mailing. The United States reasoned that Notice of Sale was left at Howard's usual place of business, albeit by a postal, rather than, an IRS employee. The Howard Court stated that this is simply an implausible reading of the Statute. Howard @ 507.

> "Notice must be given by 'the Secretary or his delegate'. The Secretary, of course, is the Secretary of the Treasuary; 'or his delegate' means :
>
> "Any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the text."
>
> Also, 26 USC, Section 7701 (a) (12) (A) (i) :
>
> "An employee of another executive department, such as the Post Office, does not meet the definition of 'delegate'. That Congress did not contemplate that 'mailing' was synonymous with 'giving' notice to an owner or 'leaving' it at his home or business is apparent from the second sentence of Section 6335 (a). Where the owner cannot be readily located or has no dewelling or business in the district, the Notice 'may be mailed to his last known address'."
>
> Howard supra @ 507

11. In contrast, the Internal Revenue Service itself has by its own regulation interpreted Section 6335 to require delivery of the Notice, rather than mailing, unless,

the owner cannot be readily located or has no place of abode or business in the district 26 C.F.R. Section 301.6335 - 1 (b) (1) (181) provides that :

> "As soon as practicable after seizure of the property, the district director shall give notice of sale in writing to the owner. Such notice shall be delivered to the owner or left at his usual place of abode or business if located within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dewelling or place of business within such district, the notice may be mailed to his last known address."

12. The internal operations manual of the Internal Revenue Serice is even more specfic as TR Manual 53 (13) 7 (2) (1987) provides that :

> "The original notice will be delivered to the taxpayer personally or left at his/her usual place of abode or business if he/she has such within the district where the seizure is made. If personal service has been attempted but could not be accomplished, or the taxpayer has no dwelling or place of business within the district, the Notice will be sent by certified mail, return receipt requested to the taxpayer's last known address within two business days of the attempted personal contact. If real property is being offered for sale, resonable efforts should be made to deliver the notice to the taxpayer personally, at which time, the taxpayer should be informed of the right to redeem the property at any time prior to the sale or within 180 days after the sale."

13. The United States did not claim that it ever attempted to serve the required Notices personally, nor that

Plaintiff could not be readily located within the district. Plaintiff has not had a proper job for some 13 years and can readily be located at his usual place of abode. In fact, Charles I. Tincher, the employee attesting to "mailing" of said Notice of Sale, has actually been to Plaintiffs' abode on 3 separate occasions, but not to deliver Said Notice of Sale.

14. On the other hand, William H. Byrant, the employee who seized / sold Plaintiffs' property at 2601 N. Cedar Crest Drive has yet to come to Plaintiffs' abode, either to personally deliver Said Notice of Seizure or Said Notice of Sale.

> "The purpose of requiring a particular method of giving notice is to prevent disputes over whether notice was received." Aqua Bar supra.

15. In enforcing the tax code the government is mandated to follow procedural steps as established by Congress. Defendant, by entering its "Affidavit" on the Record, has actually confessed that it did not comply with mandated procedures. Defendants' failure to deliver Said Notice of Sale 'personally' to Plaintiff actually Voids the Sale. Thus, Plaintiff is entitled to Summary Judgment in its action to Quiet Title on all of Plaintiffs' Properties so seized.

IN SUMMARY

1. Foregoing arguments properly address Government lack of Due Process as surrounds certain Mandated Assessment and/or Notice procedures. The burden of proving on the Record that Plaintifts were lawfully and timely assessed and/or properly Noticed rests entirely upon the Government and not, as this Court suggests, with Plaintiff.

2. Notwithstanding this Courts' earlier conclusions, nothing the Government has entered on the Record to date, can be construed to show that the Plaintiff had been lawfully assessed in compliance with 26 USC 6203 or Treasury Regulation 301.6203, or that Plaintiff had been personally given any Notice of Sale, especially since the Defendants Affiant clearly attested to the fact that said Notice was only "mailed". And not to be overlooked again, no notice of Seizure / Sale was ever personally delivered as concerns the property at 2601 N. Cedar Crest Dr., Sedgwick County Kansas.

3. Reflecting upon the Exhibits the Government placed in evidence, the Form 4340 is nothing more than a computer generated transcript, a compilation of second-hand hearsay spawned in hearsay. As concerns those Affiants attesting to the validity of Said Form 4340, such Internal Revenue employees had no personal knowledge as to any information as is required, nor did they attest to that fact. Even the employee who certified Said Form 4340 did not Attest to being the custodian, or to having any personal knowledge, or that said record could be construed as being a business record.

4. From all appearences, as the Record now stands, it is perfectly clear that the alleged Form 4340 was simply created for this particular litigation since Defendant could not produce that written assessment as was signed by the Assessment Officer.

5. This conclusion is well founded in the procedures described in the Ogden Revenue Centers description that the : "Computer generated Notice . . . are automatically forwarded to the taxpayer upon determination of assessment", which procedure leaves grave doubt as to the alleged Assessment ever being lawfully established/signed. Not to be over-looked is the question, "if automatic, why then, did not the Plaintiff receive said assessment ?"

6. Additionally, in support thereof, since "the Service does not maintain a paper record of Notice", it becomes abundantly clear just why the Government was unable to enter on the Record that copy as was allegedly signed by the Assessment Officer to prove that the alleged assessment had been properly executed – and why Plaintiff did not receive a copy of the assessment when making a 6203 request or seeking FOIA information.

7. Keeping in mind that the assessment and/or notice procedure was all accomplished automatically by a computer generated operation, Plaintiff holds that NO Valid assessment was ever actually established, or received, even when requested, is well founded since there appears to be no opportunity to have been given during that assessment operation for the Assessment Officer to sign and/or validate the alleged assessment.

8. Therefore, these several points of contention, as addressed above, are hereby brought to the Court's attention since they clearly demonstrate that there remains much doubt with Defendant's ability to prove on the Record that the alleged assessment was properly validated by the signing of an Assessment Officer.

9. Then too, had Plaintiff first seen what Mr. Tincher did not say in his Affidavit, that said Notice of Sale had not been personally delivered to Plaintiff, this fact, as did not appear on the face of Said Affidavit,.and being such as if known in due time, would have prevented the rendition and entry of the judgment questioned.

10. Thus, with the Government admitted violation of 6335 (a) and (b), brings one to conclude that there is just cause to Move this Court to Reconsider its earlier ruling.

Dated this 31st day of July, 1990

Raymond J. VanSkiver
%2220 N. Cedar Crest Drive
Wichita, Kansas
(316) 722 - 9299

Internal Revenue Service Departtment of the Treasury
801 - 629 - 174 Not Toll Free
Director Southwest Region POBox 9941
Internal Revenue
Service Center
Ogden, Utah 84409
M/S 7000

February 26, 1990

Dear Mr. Jones :

This is in response to your Freedom of Information Act request dated January 12, 1990.

We have enclosed the information found in System of Record 21.030, pertaining to you for tax years 1985, 1986, and 1987. We have not provided a complete transcript as requested because you identified specific tax years, some of which could be excluded by the computer if a complete transcript were ordered. However, the transcripts provided contain complete information concerning the tax yeras in question.

Documents maintained in System of Record 42.001 are under the jurisdiction of the Portland District Office. We have therefore transferred that portion of your request to their office. The ten day statutory period for response will not begin until your letter is received in their office.

We found no substitutes for returns which form the basis for an assessment against you, nor did we find any returns made for you pursuant to Section 6020 (b).

Forms 2162 are provided in response to item 2 of your request.

Form 23C is no longer used unless the computer is unavailable; however, we have enclosed the Summary Record of Assessment which is the computer generated document that contains assessment data and the signature of the assessment officer. The IMF MCC Transcripts are also provided as supporting documentation. You will be notified of any additional assessments made at which time you may resubmit your request. If you wish to obtain copies of instructions, you may request them from :

Internal Revenue Service
Attn : FOI Reading Room
1111 Constitution Ave. NW
Washington, DC 20224

We found no forms 4340 which pertain to you for the tax years in question.

In reply to item 5, please be advised that Form 17A is obsolete. This particular form has been replaced by computer generated notices which are automatically forwarded to the taxpayer upon determination of assessment. Further the Service Center does not maintain a paper record of these notices and therefore, no copies of notices pertaining to you exist at the Ogden Service Center.

We found no Forms 813 in response to item 6 of your request, nor did we find any documents in response to items 8 and 10.

Documents maintained by the Examination Division are included in System of Record 42.001, therefore, as mentioned above, they are under the jurisdiction of the Portland District Office.

Sincerely,

Jay Hammer
Disclosure Officer

Enclosure

Internal Revenue Service Department of the Treasury
Internal Revenue Service Center
Mitd-Atlantic Region
Philadelphia, Pa.
P.O.Box 246
Bonsalern, PA 19020

Person to Contact :
Raymond V. Price
Telephone Number :
(215) 969 - 2536
Refer Reply to :
C : CL : D
Date :
January 16, 1991

Mr. Marshall Haws
P.O.Box 624
West Chester, PA 19381

Dear Mr. Haws :

This is in response to your privacy Act request dated December 3, 1990.

We are enclosing a Certificate of Assessments and Payments pertaining to your tax. information for years ending December 31, 1981 through 1989. Form 4340 is no longer used.

This concludes our response to your request.

Sincerely yours,

Raymond V. Price
Disclosure Officer

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAYMOND J. VAN SKIVER, and
ALMA L. VAN SKIVER, Plaintiffs,

v. No. 89 - 1470 - C

UNITED STATES OF AMERICA and
JOHN DOES, Defendants.

MEMORANDUM AND ORDER

This case comes before the court on the plaintiffs' and defendant United States' cross motions for summary judgment. In addition, the court will consider plaintiffs' Motion for an Order to Strike Motion for Default Judgment filed on April 24, 1990 and plaintiffs' Response and Notice of Objection-Motion to Strike filed on May 15, 1990.

Plaintiffs' filed their Complaint on August 25, 1989 alleging three causes of action against the United States and unnamed John Does. The three causes of action were wrongful levy, unauthorized disclosure, and quiet title. On October 26, 1989, the United States filed its motion to dismiss alleging that this court lacked subject matter jurisdiction over the plaintiffs' claim and that the plaintiffs

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Note: Time of filing – Jul 16 3 : 16 PM '90 as the clerks' stamp so indicated - - -

had failed to state claims on which relief could be granted. On January 31, 1990, the court entered its Memorandum and Order granting the Government's motion to dismiss with respect to plaintiffs' wrongful levy claim and denying the Government's motion to dismiss with respect to plaintiffs' quiet title claim. In addition, the court granted in part, and denied in part the Government's motion with respect to plaintiffs' unauthorized disclosure claim. The court held that it would only consider those unauthorized disclosure claims which do not involve the filing of proper notices of tax liens or assessments which are required and necessary to levy upon the property or property rights of the plaintiffs.

On February 20, 1990, the plaintiffs filed their motion for summary judgment, challenging the procedural validity of certain tax assessments that have been made against them. on or about April 12, 1990, the Government filed its motion for summary judgment and response to plaintiffs' motion for summary judgment asserting that there was no evidence of any unauthorized disclosure of tax return information and that the tax assessments made against the plaintiffs' were procedurally valid. On April 24, 1990, the plaintiffs filed a Motion for an Order to Strike Motion for Default Judgment, and on May 15, 1990, the plaintiffs' filed a Response and Notice of Objection - Motion to Strike. The court will consider these motions as responses to the Government's motion for summary judgment.

Federal Rule of Civil Procedure 56 provides that summary judgment shall be granted where the pleadings, depositions, answers to interrogatories, admissions or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v Catrett, 477 US 317, 322 (1986); Burnette v Dow Chemical Co., 849 F.2d 1269, 1273 (10th Cir. 1988). Summary judgment is appropriate when a court can conclude that no reasonable juror could find for the non-moving party on the basis of the evidence presented in the motion and response, Anderson v Liberty Lobby, Inc., 477 US 242, 251-252 (1986). As the Supreme Court has made clear, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action'." Celotex, 477 US at 327.

After the movant has made a properly supported summary judgment motion, "the nonmovant (has) the burden of setting forth specific facts showing the existence of a genuine issue of fact for trial." Anderson, 477 US at 250; Windon Third Oil and Gas v Federal Deposit Ins., 805 F.2d 342, 346 (10th Cir. 1986). The nonmovant may not rely on the allegations or denials in its pleadings to establish a genuine issue of fact, but must come forward with an affirmative showing of evidence. Anderson, 477 US at 250. This court has stated, "There is no genuine issue for trial unless there is sufficient evidence - - significcantly probative or more than merely colorable - - favoring the non-moving party for a jury to return a verdict for that party." Jones v Credit Bureau of Garden City, 703 F. Supp. 897, 899 (D.Kansas 1988).

UNAUTHORIZED DISCLOSURE CLAIM

In its motion for summary judgment, the Government asserted that no unauthorized disclosures of tax return information had been made with respect to the plaintiffs and challenged the plaintiff to come forward with specific instances of unauthorized disclosure. The court has reviewed the documents filed by the plaintiffs and it does not appear that the plaintiffs even address this issue, let alone establish the existence of a claim sufficient to be presented to the trier of fact. Inasmuch as the plaintiffs bear the burden of proof on their unauthorized disclosure claim, their failure to specify and properly support their claim warrants the entry of summary judgemtn in the Government's favor.

QUIET TITLE

The plaintiffs seek to quiet title to certain real property by attacking the procedural validity of certain tax assessments that have given rise to federal tax liens. The plaintiffs assert that the assessments have not been made and that the statutory notices required for the assessment and collection process have not been mailed by the Internal Revenue Service. The plaintiffs' contentions are without merit. The Government has attached Internal Revenue Service Form 4340's, Certificates of Assessment and Payments, to its motion for summary judgment. These documents establish that income tax assessments were made against the plaintiffs during the relevant tax years. See Schmidt v. Internal Revenue Service, 717 F.Supp. 763 (D.Kan. 1989); US v Chila, 871 F.2d 1015, 1017-1018 (11th Cir. 1989), cert. denied, 58 U.S.L.W. 3350 (1990); US v Lorson Electric Co. Inc., 480 F.2d 554 (2d Cir. 1973); US v Miller, 315 F.2d 637, 639 (7th Cir. 1963). The plaintiffs contend that they did not receive the notices of deficiency required by Section 6212 of the Internal Revenue Code (26 U.S.C.). In response, the Government has submitted letters written by the plaintiffs and mailed to employees of the IRS accusing the IRS employees of "criminal violations" for mailing notices of deficiencies to the plaintiffs. The plaintiffs' letters contain a variety of frivolous arguments as to why the plaintiffs should not be subject to the income tax laws. Finally, the Government has submitted various affidavits of IRS employees to establish that additional notices of deficiency, notices of assessment and demand for payment, and notices of seizure and notices of sale were mailed and/or delivered to the plaintiffs. IRS records are adequate evidence to establish that statutory notices were sent. See Schmidt v. IRS, 717 F.Supp. 763, 765 (D. Kan. 1989). The plaintiffs have not submitted any affidavits or other evidence that supports their allegations of procedural irregularity. There is no evidence upon which a reasonable juror could find for the plaintiffs. Summary judgment must be entered in favor of the United States.

The Complaint also names John Does as defendants. These John Does have not been identified nor has there been any attempt to serve any individual defendants. Pursuant to Federal Rule of Civil Procedure 4(j) the time in which to serve a Summons and Complaint has expired. Therefore, the court will dismiss the plaintiffs' Complaint, without prejudice, with respect to John Does.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment is denied.

IT IS FURTHER ORDERED that plaintiffs' Motion for an Order to Strike Motion for Default Judgment is denied.

IT IS FURTHER ORDERED that plaintiffs' Motion to Strike of May 15, 1990, is denied.

IT IS FURTHER ORDERED that plaintiffs' complaint against John Does is dismissed.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is granted.

Dated this 16th day of July, 1990, at Wichita, Kansas.

Sam A. Crow, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAYMOND J. VAN SKIVER, et ux.,
Plaintiffs,

v. Case No. 89 - 1470 - C

UNITED STATES OF AMERICA, et al.,
Defendant.

MOTION TO AMEND

COMES NOW the Plaintiffs, Raymond J. VanSkiver et ux Alma L. VanSkiver, to Move the Court, pursuant to FRCP, Rule 15 (d), to Amend its Pleading in Order to add certain transactions and/or occurances which have taken place since Plaintiffs filed their original Pleading.

MEMORANDUM IN SUPPORT

1. In lieu of Defendants' recent activities, that of serving Plaintiffs' with it's Notice of Intent to Levy – made out of time and without benefit of any signed or "Valid Assessment" having first being furnished Plaintiffs – together with that required "Notice and Demand". Plaintiffs seek to have those tax years of 1984 and 1985, as were recently Noticed by Defendants, included within Plaintiffs' original Pleading since Defendants recent activities are over-lapping and just as wrongful.

2. In order to show that Defendants' activities are indeed "Wrongful" and "out of time", Plaintiff hereby attaches Exhibits "A" -1 and "A" - 2, which are copies of

letters, dated 10 Aug 1982, 24 Oct 1982, and 11 - 22 - 82, wherein Plaintiffs asked for copies of that assessment as are mandated to be furnished Plaintiff whenever such are "requested". see attached 301.6203 - 1, Exh. "C" 6.

3. Exhibit "B" 1 and "B" 2, are Form 843 Claims for Refund based on Defendants' failure to furnish Plaintiff that mandated "Notice and Demand". Notice the date received is stamped, April 2, 1985. Plaintiff obtained this Exhibit via FOIA.

4. Most interestingly, is FOIA Exhibit "B" 3, which is an Inter-Office Memo addressing Said 843 Form as Plaintiffs' made on 4 / 2 / 85 wherein Defendant confessed that NO Assessment had yet been made. No Assessment and the property had already been seized ! ! !

5. Exhibit "C" 1 and "C" 2 are "Notices of Intent to Levy", dated 12 - 4 - 89 as were received by Plaintiffs – 4 and 5 years after taxable years, or 1 and 2 years "out of time".

6. Nevertheless, copies of Said Exhibits were sent back to the Service along with Plaintiffs' letter of Aessessment request. Exhibit "C" 3 (a), and copies of 301 - 6203 - 1, Exhibit "C" 6 and "C" 7, which made it perfectly clear that Defendants are mandated to furnish Plaintiffs that mandated signed Assessment, which would actually identify Plaintiff by name and number.

7. However, acting contrary to 301.6203 - 1, Plaintiff received back Form 4340, which is nothing more than a copy of Plaintiffs' alleged account. (Exh "C" 4, & "C" 5.

8. By way of explaination, the Service included a letter clarifing : "Form 4340 is the ONLY record of assessment we have which identifies you" ! Exh. "C" 3 (a). However, 301.6203 - 1 mandates that, upon request, a copy of the Assessment shall be furnished ! A print-out will Not suffice !

9. Exhibit "C" 4 is an FIOA "Assessment Certificate Form 23C which has actually been singed by an Assessment Officer, however, Plaintiff is NOT identified ! ! !

10. Exhibit "C" 5, "C" 6 are FOIA Certificates of Assessments and Payment, which are not signed by Ass. Officer.

11. As has been the case for the past 8 yeras, Defendant has NOT once adhered to those Congressionally mandsted procedures – that of furnishing Plaintiffs with an assessment for the years of 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, or 1985.

12. Exhibit "D" 1 is an IRS Notice that Plaintiff "may sue the United States", nothing said as to any Statute being necessary ! ! !

THUS, Plaintiff seeks to Amend its' original Pleading so as to add to it's Action those years of 1975 – 1985, which can be resolved together and at the same time.

Dated this 15th day of May, 1990

Raymond H, VanSkiver, Plaintiff

Raymond J. VanSkiver — 508 - 14 - 3783
Alma L. VanSkiver — 508 - 20 - 3445

2220 N. Cedar Crest Drive
Wichita Ks 67223

24 October 1982

To: Secretary of Treasury USA, et al.
Commissioner of IRS, et al.
Attorney General USA, et al.
c/o Secretary of Treasury USA, Wa. D.C.

GENTLEMEN:

On 10 August 1982, I forwarded to you a statutory and First Amendment attach against your claimed or asserted or supposed jurisdiction as provided for under Title 5 US Code 101 - 559.

You were required, as a matter of mandate of law, to plead and to prove on the Administrative Record that your supposed jurisdiction existed by your production of jurisdictional facts which countered our jurisdictional facts of immunity to the right to be free from Federal and / or State Direct Taxation and / or regulations.

However, I now have before me a "Final Notice" claiming an amount due which far exceeds our total income as claimed for those years of 1978, 1979.

It is hard for me to believe that this matter should continue without your first proving jurisdiction !

Since these figures are so erroneous and that only one of us has been audited, it is now necessary that we ask for copies of your assessments of our "supposed" incomes for the years of 1975, 1976, 1977, 1978, 1979 that we might view how you determined our owing far more than our supposed income.

Exhibit "A"-1

Raymond Van Skiver
Raymond J. VanSkiver

Alma L. Van Skiver
Alma L. VanSkiver.

cc./ Margaret Chandler, Wichita Divisional office.

Katherine J. Beadles
Notary Public

My commission expires OCT. 21 19 85

KATHERINE J. BEADLES
NOTARY PUBLIC
My Appt. Exp. 10-21-85

Internal Revenue Service

AUSTIN, TX 73301

In reply refer to: 18021431
NOV. 15, 1982 LTR 108C 2969
508-20-3445

ALMA L VAN SKIVER
2220 N CEDAR CREST DR
WICHITA, KS 67223

Social Security Number: 508-20-3445

Dear Ms. Skiver:

Thank you for your letter dated Sep 10, 1982.

The agency identified below has responsibility for handling matters of this kind, so we have sent your letter to them for reply. We are sorry we are unable to be more helpful.

Sincerely yours,
Manager, Correspondence Unit

Ltr 108C 2969

In

Second Notice to Request from you: as was first received 10 Sept 1982.

Since there seems to be a question as to "who owes who" and for what. It is only fitting that I review your assessments of tax owing for the years of: 75-76-77-78-79-80-81-82 so that I may be able to understand more fully where you are coming from.

Exhibit # "A" - 2

Not included within FOIA, but rather, comes from Plaintiff's own records - Request for Assessment

Raymond Van Skiver
11-22-82

Form 843
(Rev. October 1981)
Department of the Treasury
Internal Revenue Service

Claim

▶ See instructions on back

OMB No. 1545-0024
Expires 10-31-83

If your claim is for an overpayment of income taxes, do NOT use this form (see instructions)

Name of taxpayer or purchaser of stamps
Alma L. VanSkiver
Number and street
2220 N. Cedar Crest Drive
City or town, State, and ZIP code
Wichita Kansas 67223

Fill in applicable items—Use attachments if necessary

1 Your social security number
508 - 20 - 3445

2 Employer identification number

3 Internal Revenue Service Center where return (if any) was filed
Austin TX

4 Name and address shown on return, if different from above

5 Period—prepare separate form for each tax period
From , 1980 , to , 19 81

6 Amount to be ~~refunded or~~ abated
$13,978.37 – $698.92

7 Dates of payment

8 Type of tax
☐ Employment ☐ Estate ☐ Excise ☐ Gift ☐ Stamp

9 Kind of return filed
☐ 706 ☐ 709 ☐ 720 ☐ 940 ☐ 941 ☐ 990-PF ☐ 4720 ☐ Other (specify) ▶

10 If this claim involves refund of excise taxes on gasoline, special fuels or lubricating oil, please indicate your tax year for income tax purposes

11 Explain why you believe this claim should be allowed and show computation of tax refund or abatement

See attached:

Exhibit "B" – 1
Included within FOIA
—Request for Abatement
No Notice or Demand

Review Staff
RECEIVED
APR - 2 1985
I.R.S.
Wichita, Kansas

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.
Unvoluntarily signed under threats of distraint
Signed Alma L. VanSkiver Dated april 1, 4 19 85

Director's Stamp
(Date received)

For Internal Revenue Service Use Only
☐ Refund of taxes illegally, erroneously, or excessively collected.
☐ Refund of amount paid for stamps unused, or used in error or excess.
☐ Abatement of tax assessed (not applicable to estate or gift taxes).

For Paperwork Reduction Act Notice, see Instructions on back.

Form 843 (Rev. 10-81)

Explaination as to why said "Notice of Deficieny" and/or "Penalty Assessment" should be "ABATED" !

1. NO formal "Hearing" has been afforded to one "Alma L. VanSkiver" !

2. Said Notice of Deficieny" NOT properly signed by agent preparing said assessment !

3. NO Notice and Demand was ever issued prior to "Notice of Deficiency as required by Section 6303 !

4. The Secretary has NOT / can NOT make one "Alma L. VanSkiver" liable for any tax as required in Section 6011(a) since she is NOT a government employee or any officer of a corportion as so noted in any number of places within the IRC !

5. As indicated in Section 61(a), General Definitions: Compensation for service and/or gains derived from dealings in property are the "sources" from which income is derived. Said IRS agent has established what appears to be a source from which an income might be derived; should "Alma L. VanSkiver be made liable.

> "Receipts are NOT synonymous with income .... "
> [U.S. v. Clark, 211 F.2d 100 (1954)]
>
> "It's whole purpose was to exclude the source from which income is derived ...."
> [No. 27, AM Jur. 2a, Section 18, page 318]
>
> "A tax on income is not legally or economically a tax on its source."
> [Graves v. People of the State of New York ex rel. O'Keefe,
> 59 S.Ct. 595, 306 U.S. 466, 83 L.Ed. 927, 120 A.L.R. 1466]
>
> "Wages and salaries are the main "source" of income for most people."
> [IRS Publication 525 (rev. 81)
>
> "The right to labor and to its protection from UN-lawful interference is a constitutional, as well as common law right. Every man/woman has a natural right to the fruits of his own industry. (Continuing further to the third paragraph, which reads in part as follows:) "One canNOT be deprived of such right by arbitarary mandate of the legislature, and it merits legal protection." And such right is likewise embraced by the Fifth amendment of the Constitution as so noted in the case of Allgeyer v. Louisiana, 165 U.S. 578 (1897).
> [No. 48 AM Jur 2d, Section 2, page 80]

Exhibit "B"-2
accompanied "B"-1 within FOIA
item # 3 — No Notice & Demand
1. No formal Hearing

Alina L. VanShiver Note to file	Work Paper No.	Accountant	3143	4/2/85
		Reviewed By		

The Form 843 filed on 4/2/85 in response to the 90 d. Ltr is a claim for abatement under IRC § 6403(b) since the tax has not been assessed, much less paid.

Therefore, no claim disallowance letter is required.

Boris Bulatkin
Reviewer, 5048
4-2-85

Exhibit "B"-3
FOIA material
The tax has not been assessed,
Tax never was owed,

Professional Forms • Omaha, Ne. 68102

At:
318 4801

P 902 393 944

RLR 000013
18247-698-90008-9 8947

Department of the Treasury
Internal Revenue Service
AUSTIN, TX 73301

DATE OF NOTICE: 12-04-89 8952 CP504
TAXPAYER IDENTIFYING NUMBER: 508-20-3445
FORM 1040 TAX PERIOD 12-31-84

FOR ASSISTANCE YOU MAY CALL US AT:

1-800-424-1040

ALMA L VANSKIVER
2220 N CEDAR CREST DR
WICHITA KS 67223-7015

OR YOU MAY WRITE TO US AT THE ADDRESS SHOWN AT THE LEFT. IF YOU WRITE, BE SURE TO ATTACH THE BOTTOM PART OF THIS NOTICE.

NOTICE OF INTENT TO LEVY

THIS IS YOUR FINAL NOTICE. YOUR FULL PAYMENT OF THE FEDERAL TAX SHOWN BELOW HAS STILL NOT BEEN RECEIVED. IF FULL PAYMENT IS NOT RECEIVED WITHIN TEN DAYS FROM THE DATE OF THIS NOTICE, ADDITIONAL INTEREST AND PENALTIES WILL BE CHARGED.

A NOTICE OF FEDERAL TAX LIEN MAY BE FILED, WHICH IS A PUBLIC NOTICE THAT THERE IS A TAX LIEN AGAINST YOUR PROPERTY. AS PROVIDED BY SECTION 6331 OF THE INTERNAL REVENUE CODE, YOUR PROPERTY OR RIGHTS TO PROPERTY MAY BE SEIZED. THIS INCLUDES SALARY OR WAGES, BANK ACCOUNTS, COMMISSIONS, OR OTHER INCOME. REAL ESTATE AND PERSONAL PROPERTY SUCH AS AUTOMOBILES, MAY ALSO BE SEIZED AND SOLD TO PAY YOUR TAX.

TO PREVENT THIS ACTION, SEND FULL PAYMENT TODAY BY CHECK OR MONEY ORDER PAYABLE TO INTERNAL REVENUE SERVICE. WRITE YOUR TAXPAYER IDENTIFYING NUMBER ON YOUR PAYMENT. INCLUDE THE BOTTOM PART OF THIS NOTICE WITH YOUR PAYMENT SO WE CAN QUICKLY IDENTIFY AND CREDIT YOUR ACCOUNT.

WE HAVE CALCULATED PENALTY AND INTEREST AMOUNTS TO THE DATE OF THIS NOTICE. THE FAILURE TO PAY PENALTY INCREASES FROM ONE HALF PERCENT TO ONE PERCENT PER MONTH AFTER THIS NOTICE.

IF YOU RECENTLY PAID THE AMOUNT DUE, OR IF YOU CANNOT PAY THIS AMOUNT IN FULL, CONTACT THE OFFICE SHOWN ABOVE TODAY. AS EXPLAINED IN THE ENCLOSED PUBLICATION, ENFORCEMENT ACTION MAY BE TAKEN 30 DAYS AFTER THIS NOTICE.

Exhibit "C" -1
Notice of Intent to levy received
two years after expiration date to
make Assessment

TAX FORM: 1040
TAX PERIOD: 12-31-84

BALANCE OF PRIOR ASSESSMENTS	$29,952.47
LATE PAYMENT PENALTY	$0.00
INTEREST	$190.15
TOTAL AMOUNT DUE	$30,142.62

TO MAKE SURE IRS EMPLOYEES GIVE COURTEOUS RESPONSES AND CORRECT INFORMATION TO TAXPAYERS, A SECOND EMPLOYEE SOMETIMES LISTENS IN ON TELEPHONE CALLS.

KEEP THIS PART FOR YOUR RECORDS

518 4801
P 902 343 143

18247-698-90009-9 8947

Department of the Treasury
Internal Revenue Service
AUSTIN, TX 73301

DATE OF NOTICE: 12-04-89 8952 CP504
TAXPAYER IDENTIFYING NUMBER: 508-20-3445
FORM 1040 TAX PERIOD 12-31-85

FOR ASSISTANCE YOU MAY CALL US AT:

ALMA L VANSKIVER
2220 N CEDAR CREST DR
WICHITA KS 67223-7015

1-800-424-1040

OR YOU MAY WRITE TO US AT THE ADDRESS SHOWN AT THE LEFT. IF YOU WRITE, BE SURE TO ATTACH THE BOTTOM PART OF THIS NOTICE.

NOTICE OF INTENT TO LEVY

THIS IS YOUR FINAL NOTICE. YOUR FULL PAYMENT OF THE FEDERAL TAX SHOWN BELOW HAS STILL NOT BEEN RECEIVED. IF FULL PAYMENT IS NOT RECEIVED WITHIN TEN DAYS FROM THE DATE OF THIS NOTICE, ADDITIONAL INTEREST AND PENALTIES WILL BE CHARGED.

A NOTICE OF FEDERAL TAX LIEN MAY BE FILED, WHICH IS A PUBLIC NOTICE THAT THERE IS A TAX LIEN AGAINST YOUR PROPERTY. AS PROVIDED BY SECTION 6331 OF THE INTERNAL REVENUE CODE, YOUR PROPERTY OR RIGHTS TO PROPERTY MAY BE SEIZED. THIS INCLUDES SALARY OR WAGES, BANK ACCOUNTS, COMMISSIONS, OR OTHER INCOME. REAL ESTATE AND PERSONAL PROPERTY SUCH AS AUTOMOBILES, MAY ALSO BE SEIZED AND SOLD TO PAY YOUR TAX.

TO PREVENT THIS ACTION, SEND FULL PAYMENT TODAY BY CHECK OR MONEY ORDER PAYABLE TO INTERNAL REVENUE SERVICE. WRITE YOUR TAXPAYER IDENTIFYING NUMBER ON YOUR PAYMENT. INCLUDE THE BOTTOM PART OF THIS NOTICE WITH YOUR PAYMENT SO WE CAN QUICKLY IDENTIFY AND CREDIT YOUR ACCOUNT.

WE HAVE CALCULATED PENALTY AND INTEREST AMOUNTS TO THE DATE OF THIS NOTICE. THE FAILURE TO PAY PENALTY INCREASES FROM ONE HALF PERCENT TO ONE PERCENT PER MONTH AFTER THIS NOTICE.

IF YOU RECENTLY PAID THE AMOUNT DUE, OR IF YOU CANNOT PAY THIS AMOUNT IN FULL, CONTACT THE OFFICE SHOWN ABOVE TODAY. AS EXPLAINED IN THE ENCLOSED PUBLICATION, ENFORCEMENT ACTION MAY BE TAKEN 30 DAYS AFTER THIS NOTICE.

Exhibit "C" — 2
Notice of Intent to levy; received two years after expiration date to make assessment

TAX FORM: 1040
TAX PERIOD: 12-31-85

BALANCE OF PRIOR ASSESSMENTS	$9,499.19
LATE PAYMENT PENALTY	$0.00
INTEREST	$60.33
TOTAL AMOUNT DUE	$9,559.52

TO MAKE SURE IRS EMPLOYEES GIVE COURTEOUS RESPONSES AND CORRECT INFORMATION TO TAXPAYERS, A SECOND EMPLOYEE SOMETIMES LISTENS IN ON TELEPHONE CALLS.
KEEP THIS PART FOR YOUR RECORDS

2220 N Cedar Crest Dr
Wichita Kansas

2 Jun 1990

Dear Sir:--

Enclosed please find copies of "Notice of Intent to Levy" for the taxing periods of 12-31-84 and 12-31-85

As of this above date no assessment or Notice/Demand has yet been received by me

Therefore, in accordance with 301.6203-1 (as marked in yellow on copies of said regulation) I hereby and forthwith am making a request for said assessments

Until these assessments have been received I can not consider that there is a tax owing

Exhibit "C" - 3(a)
Formal Request for Assessment
as provided by Code — Not a
FOIA Request

Van Skiver

Alma L VanSkiver

Exhibit "C"-6

An Inquiry Into the Assessment Process

ALAN R. JOHNSON*

The majority of Internal Revenue Code sections are descriptive: "gross income means;"[1] "gross income does not include;"[2] "shall be considered as gains and losses from sales or exchanges of capital assets held for more than 1 year."[3] A smaller number of sections is proscriptive:[4] "No amount shall be included in gross income . . . if . . . such taxpayer makes and files a consent;"[5] "An affiliated group of corporations shall . . . have the privilege of making a consolidated return;"[6] "returns . . . shall be made."[7] A still smaller number of sections is proscriptive with respect to the Internal Revenue Service, rather than the taxpayer. Most, although not all,[8] of these sections are contained in subtitle F (Procedure and Administration), particularly chapters 63 (sections 6201 through 6216) and 64 (sections 6301 through 6365). This article deals with one of those sections, section 6203, "Method of Assessment." This section, in its entirety, states:

> The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of assessment.

The regulations under section 6203 are similarly succinct. In their entirety, they state:

> § 301.6203-1. *Method of assessment.*—The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers

---

* Alan R. Johnson is a member of the New York Bar and is a partner in the law firm of Fox Glynn & Melamed, New York, New York.

[1] I.R.C. § 61(a).

[2] *E.g.*, I.R.C. §§ 101(a)(1), 102(a), 103(a).

[3] I.R.C. § 1231(a).

[4] "Proscriptive" is meant to include not only sections requiring the taxpayer to do something, but also sections which state that if the taxpayer performs a certain action (usually filing an election) the tax effect will be different from what it would have been had the action not been performed. Obviously, all Code sections are "proscriptive" in the sense that the taxpayer may arrange his affairs to fit, or not fit, within the conditions for application of the section.

[5] I.R.C. § 108.

[illegible]

Exhibit "C"-7

> in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

Let us suppose that, the law of averages[9] being what it is, from time to time the Service does *not* follow the requirements of the statute and regulations. Does this mean that the taxpayer is not liable for the improperly assessed tax? Much to the distress of the Service, the answer, sometimes, is "yes."

Procedural Provisions of the Code: A General Introduction

The procedural provisions of the Code appear to be the creation of a scholastic, but whimsical, mind. In general, however, the courts take them literally: the game must be played according to the rules. Thus, a Tax Court petition filed 91 days after the mailing of a notice of deficiency is absolutely invalid,[10] and the taxpayer must pay the tax (though he may, if he chooses, later sue for a refund). A claim for refund filed one day after the last date required for filing is absolutely invalid and the Service will not allow a refund,[11] nor will any court have jurisdiction of a refund suit.[12] Under these circumstances, the taxpayer is forever barred from receiving a refund of the tax. The requirement of section 6212 that a notice of deficiency must be sent to the taxpayer's "last known address" means just that: if so sent it is valid even though the taxpayer never received it,[13] but if not so sent it is invalid even if the taxpayer did receive it.[14] It matters not that in the first case the taxpayer may incur a

---

[9] And, probably, Murphy's Law.

[10] Galvin v. Comm'r, 239 F.2d 166 (2d Cir. 1956).

[11] Reg. § 301.6402-2(a)(1).

[12] Gross v. United States, 130 F. Supp. 441 (D. Mass. 1955).

Internal Revenue Service
Director Southwest Region
Austin Compliance Center

Dept. of the Tresury
P.O.Box 2986, Austin, TX
Austin, Texas 78769
Stop 7000 AUCC

Person to Contact :
Telephone Number :
(512) 326-0330 Not Toll-Free
Refer Reply to :
E : D FOIA 90 - 8
Date :
January 23, 1990

Alma L. VanSkiver
2220 N. Cedar Crest Dr.
Wichita, KS 67223

Dear Mrs. VanSkiver :

This letter is in response to the Freedom of Information Act (FOIA) request dated January 2, 1990, which was received in my office January 9, 1990.

Enclosed are an original and copy of two Forms 4340, Certificates of Assessments and Payment for tax years 1984 and 1985 according to your request.

A Certificate of Assessments and Payments, Form 4340, is the only record of assessments we have which identifies you and this form meets all the requirements of Section 6203 of the Internal Revenue Code (IRC).

The total cost for the requested documents is $36.00 or $17.00 x 2 for two hours search fees and $2.)) for two certification documents, Forms 4340. Please forward your remittance of $36.00 with a copy of this letter to the return address above.

This letter concludes my response to your request.

Sincerely,

Michael S. Perkins
Discolosure Officer

Enclosures : As Stated

Assessment Certificate

Summary Record of Assessments

1. Service center AUSC
2. Date JUNE 30, 1982
3. Prepared by JW
4. Number 18-2405

Class of Tax	Current Assessments		Deficiency and Additional Assessments (Resulting From Regular Audit Examinations)			Total Assessments
	Tax & Penalty (a)	Interest (b)	Tax & Penalty (c)	Interest (d)	No. of Items (e)	(f)
Withheld individual income and FICA	0.00	0.00	0.00	0.00	0	0.00
Individual income—other	0.00	0.00	4,359.50	947.59	2	5,307.09
Corporation income and excess profits						
Excise						
Estate and gift						
Tax on carriers and their employees						
Federal unemployment tax act						
Total Assessments	0.00	0.00	4,359.50	947.59	2	5,307.09

Exhibit "C"-4 — Example of Form "23C" as received in FOIA material — Each Form "23C" contained signature of the assessment officer ONLY — Taxpayer Not identified nor was it ever furnished Plaintiff

...pardy Assessments Against Principal Taxpayers (Included in the assessments above)		
Number ... incipal taxpayers		
Total assessed against principal taxpayers		

6. Prepared From Accounting Assessment Journals

Date and Number	Through	Date and Number
06-30-82 3-06-0325		

Certification

I certify that the taxes, penalties, and interest of the above classifications, hereby assessed, are specified in supporting records, subject to such correction as subsequent inquiries and determinations in respect thereto may indicate to be proper.

7. Date JUNE 30, 1982

8. Signature (For service center director of Internal Revenue)

Assessment Officer

Form 23C [illegible]

Department of [illegible]

Certificate of Assessments and Payments

Name of Taxpayer	Address (Number, street, city, and state)	EIN or SSN	
Alma L Vanskiver	2220 N Cedar Crest Dr Wichita, Kansas 67223	508-20-3445	1040

Date (a)	Explanation of Transactions (b)	Assessment (Abatement) (c)	Credit (Credit Reversal) (d)	Balance (e)	DLN or Account Number (f)	23C Date (g)	Period Ending (h)
11-10-88	Return Filed	.00			18221 324 03048	01-09-89	12-31-84
04-15-85	Withholding credit		201.00				
	Audit tax Assessment	12,234.00			18247 698 90008	11-13-89	
	Fraud penalty	9,840.00				11-13-89	
	Estimated tax penalty	754.00				11-13-89	
	Interest	7,325.47				11-13-89	
11-13-89	First Notice Date			29,952.47			

Exhibit – "C" – 5
was Said Assessment ever
furnished to Plaintiff until After
Plaintiff made a formal request
In accordance with Section 6203
Note: Said Assessment did Not
accompany FOIA and was Not
furnished Plaintiff until After
Code was cited

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes spec ... period stated, and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating ... this office as of the date of this certification are shown therein.

Signature of ~~Director~~ (required for certification)
for Carolyn Wunneburger, Manager
Certification Unit
Elida Martinez

Location
Austin Service Center - Austin, Texas

Date
January 17, 1990

Form **4340** (Rev. 7-80) (Use and issue first "Rev. 7-74" ... U.S. Government Printing Office ...

Department of the Treasury - Internal Revenue Service

Certificate of Assessments and Payments

Name of Taxpayer Alma L Vanskiver	Address *(Number, street, city, and state)* 2220 N Cedar Crest Dr Wichita, Kansas 67223	EIN or SSN 508-20-3445 1040

Date *(a)*	Explanation of Transactions *(b)*	Assessment *(Abatement)* *(c)*	Credit *(Credit Reversal)* *(d)*	Balance *(e)*	DLN or Account Number *(f)*	23C Date *(g)*	Period Ending *(h)*
11-10-88	Return Filed	.00			18221 324 03049	01-02-89	12-31-85
04-15-86	Withholding credit		1,854.00				
	Audit tax Assessment	5,550.00			18247 698 90009	11-13-89	
	Fraud penalty	3,994.27				11-13-89	
	Estimated tax penalty	185.00				11-13-89	
	Interest	1,623.92				11-13-89	
11-13-89	First Notice Date			9,499.19			

Exhibit "C"-6
Said Assessment Does Not contain
The Signature of the Assessment
Officer — Nov

I certify that the foregoing transcript of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, penalties, interests, abatements, credits, refunds, and advance or unidentified payment relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

Signature of ~~Director~~ *(required for certification)* for Carolyn Wunneburger, Manager Certification Unit Elida Martinez	Location Austin Service Center - Austin, Texas	Date January 17, 1990

Form **4340** (Rev. 7-80) *Use and issue first "Rev. 7-74"* Department of the Treasury - Internal Revenue Service

Dept of the Treasury
Internal Revenue Service
Austin, TX 73301

In reply refer to : 1869700
July 25, 1983 LTR 916AU
00633

Raymond J. VanSkiver
2220 N. Cedar Crest Dr.
Wichita, KS 67223

Kind of Tax : Income

Dear Mr. VanSkiver :

We are sorry, but we cannot consider your claim for the tax period ended Dec. 31, 1979 because you must file a seperate claim for each period.

This letter is your legal notice that we will not consider your claim. If you wish to bring suit or proceedings for recovery of any tax, penalties, or other moneys for which this disallowance notice is issured you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Court of Claims. The law permits you to do so within 2 years from the mailing date of this letter.

Sincerely yours

Carolyn Leonard
Director, Service Center

(1 of 22 copies received)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAYMOND J. VAN SKIVER, et ux,
Plaintiff,

v. Case No. 89 - 1470 - C

UNITED STATES OF AMERICA, et al.,
Defendant.

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiffs, Raymond J. VanSkiver et ux, Alma L. VanSkiver, and moves the Court for Summary Judgment pursuant to FRCP, Rule 56 (a), on the grounds that the government acted arbitarily and capriciously by way of procedural violations in as much, that from a procedural standpoint, said procedrues were irregular, insufficient, and/or valueless, as the government failed to serve Plaintiffs with that statutory "Notice of Assessment" and/or "Notice and Demand", and for its failure to comply with "other" mandated procedures,

MEMORANDUM IN SUPPORT

1. The aforenamed Plaintiff has moved this Court for Summary Judgment since Summary Judgment is appropriate where no genuine issue of fact remains to be decided so that the moving party is entitled to judgment as a matter of law. Atlas Concrete Pipe, Inc., v. Roger J. & Sons, 668 F.2d 905, 908 (6th Cir. 1982); Chesapeake & Ohio Ry, Co., v. City of Bridgman, 669 F. Supp. 823, 824 (W.D.Mich. 1987).

2. Thus, the moving party bears the initial responsibility of informing the court as to the basis of its motion and identifying those postions of the record which demonstrate the absence of a material issue of fact. Celotex Corp. v Catrett, 477 US 317, 106 S.Ct. 2553(1986).

I PROCEDURAL VALIDITY

1. For the condition precedent of liability to be met, there MUST be a lawful assessment, either a voluntary one by the taxpayer, or one procedurally proper by the IRS, Bothe v Flour, 813 F.2d 1405 (9th Cir. 1983).

2. Thus, according to the IRCode, there are certain statutory procedures that the IRS MUST follow in the process of administratively collecting taxes. See US v. Berman, 825 F.2d 1055 (6th Cir. 1987) :

> "These statutory procedures include the making of an assessment against the taxpayer, 26 USC 6203 and mailing a Notice of Assessment and Demand for payment to the Taxpayer, 26 USC 6303 (a)."

3. By the Services' own language, e.g. 6212 (a) and 6213 (a), the anti - injunction Act does not apply to a taxpayers' suit to enjoin a levy imposed when the IRS violates congressionally mandated procedures. The 9th Circuit in the case of Jensen v IRS, 835 F.2d 195 :

> "Once a taxpayer satifies one of the statutory exceptions to the Act, he is no longer jurisdictionally barred from seeking an injunction. See Perlowin v. Sassi, 711 F.2d 911 (9th Cir. 1983). Here, the IRS's failure to comply with the notice provisions of 26 USC 6212 (a) and 6213 (a) before levying on Jensen's wages constitutes an exception to the Act.

> Section 6213 (a) expressly provides that a levy may be enjoined 'notwithstanding the provisions of section 7421 (a)'. The district court had jurisdiction to hear Jensen's Suit. See Laing v US, 423 US 161, (1975); Perlowin, 711 F.2d @ 911."

4. Courts which have characterized suits against a lien or levy, like the present one, as a Quiet Title Action, have also seen no barrier to them in the Anti - Injunction Act. A Quiet Title Action simply is not a suit to restrain the assessment or collection of tax. Otherwise, Section 2410, which was enacted well after the original Anti - Injunction Act, would be impossible to reconcile with Sec. 7421. Agua Bar & Lounge, Inc., v US, 539 F.2d 940 (3rd Cir. 1976); Coson 286 F.2d @ 468. The Coson Court held :

> "We agree with the holding of the trial court that the prohibition against suits to restrain collection or assessment of taxes has no bearing upon this case which is one for a wholly different purpose. We think it plain that the only type of relief needed here is a decree holding the tax lien a cloud on Plaintiffs' title and cancelling it. There is no need for any injunctive relief. We hold that the court below had jurisdiction."

5. It should be noted that the Coson Court did not rule out Injunction relief. See Saxon, 286 F.2d 459.

II VIOLATIONS OF DUE PROCESS

1. By permitting a taxpayer to invoke 28 USC 2410 to challenge the validity of the way in which the IRS has enforced a tax lien and levy, the Courts are simply examining possible violations of an individual's rights that have

occurred during the course of the administrative assessment / collection process. Yanniceli v Nash, 354 F. Supp. 143 (D.N.J. 1973). A federal tax lien and levy might be held irregular, insufficient and invalid for failure by the IRS to comply with statutory procedures, thereby violating the Fifth Amendments' Due Process Rights.

> "The failure of the Board and of the Department of Justice to follow their own established procedures was held a violation of Due Process."
>
> US v Hoffner, 429 F.2d 812 (4th Cir. 1970)

2. Without exception, each agency of the government must scrupulously observe rules, regulation, and/or procedures which it has itself established. When it fails to follow its own procedures, its action canNOT stand and courts will strike it down. Hoffner, supra; Lojeski v. Boandle, 788 F.2d 196 (3rd Cir. 1986). (The Circuit Court stated that it recognized that "a violation by an agency of its own rules can provide a basis for reversal of the agency action." The remedy is the invalidation of the agency's action.)

III ORIGINAL ACTION CITES PROCEDURAL OMISSIONS

1. Plaintiffs' original Complaint challenged Defendants' procedural omissions as were pointed out at Count I & II :

(a) Failure to "Assess';

(b) Failure to issue a statutory "Notice of Assessment" and "Notice and Demand";

(c) Failure to seize Plaintiffs' property within the meaning of 26 USC 6335 (a) and (b);

(d) Failure to notice Plaintiff of said tax sale in direct violation of 26 USC 6335 (b) or 301.6335 (c) (1).

IV MATERIAL ISSUES OF FACT

1. Attached hereto and made a part hereof are documents as received by way of FOIA and/or Statutory Requests and marked Exhibits "A" through "D", [p. 94 a to 108 a] However, Exhibit "A" 2, was not included within said FOIA material, but rather, comes from Plaintiffs' files !

Exhibit "A" 2, indicates that Plaintiff, for the second time, formally asked the Service for its Assessment for the years 1975 through 1982. [p. 94 a, 95a]

Exhibit "B" - 1, is a copy of Plaintiffs' 843 Claim for Refund as was sent to Defendant back in 1984, where found on its attached (Exhibit "B" 2 @ item "1", "No formal Hearing had been afforded Plaintiff [See p. 96 a]. And @ item "B" 2, No Notice and Demand were ever received". [p. 97 a]

Exhibit "B" 3, is a copy of the Services' inter-officer Memo where the Service confesses that "the tax has NOT been ASSESSED". [p. 98 a]

Exhibit "B" 4, is a copy of the "Assessment Certificate – Form 23C. NOwhere is Plaintiffs' name, identification number – but, the Assessment Officer did sign it; Similiar copies were received for other taxable years as were requested. [p. 105 a]

2. And to add support to Defendants' failure to adhere to those statutory mandates, on 4 Dec. 1989, Plaintiff received Defendants' "Notice of Intent to Levy" for the years 1984 and 1985 (See Exhibit "C" 1, [p. 99 a] and "C" 2, [p. 100 a]. No where is found an "Assessment", nor "Notice and Demand", although mention of prior Assessments is found thereon.

3. Understanding that the "Assessment" is necessary before "a tax can be found to be owing", or a "Levy" can issue, Plaintiff, on 2 Jan. 1990, made a formal request (see Exhibit "C" 3 (a), [p. 101 a - 103 a], citing Statute 301.6203 - 1 and included copies of Said Statute to establish Plaintiffs' entitlement to said Assessment without further delay.

4. On 23 Jan. 1990, Defendants' reply letter was received, (see Exhibit "C" 3 (b), [p. 104 a] . Wherein it states that Form 4340 – not Form 23C, is the only record of assessment that Defendant have which identifies the Plaintiff (see Exhibit "C" 4 and "C" 5, [p. 105 a, & 106 a] – and this form meets all the requirements of Section 6203 of the Internal Revenue Code (IRC) ! ! !

5. However, nowhere on Defendants' Form 4340 does there appear that Signature of the Assessment Officer, nor does it include the nature of the tax being assessed.

6. And, nowhere within Defendants' communication does it reveal that its alleged assessment had ever been furnished to the Plaintiff ! ! !

7. Notwithstanding, those statutes as are mandated, Defendants' attitude toward that statute is well demonstrated as Defendant worked to convert Plaintiffs' statutory Request for Assessment (see 301.6203 - 1 and copy of said statute as was included within Plaintiffs' request, [p. 101 a - 103 a]), into a FOIA Request, so as to charge for what said Statute directs shall be furnished Plaintiff upon request.

8. Contrary to Defendants' well intended efforts, since Plaintiff did not receive Defendants' "Notice of Intent to Levy" until 1989 – one full year after the expiration date for Defendant to make any lawful assessment, Plaintiff NEVER received any VALID assessment as mandated by Congress. Hence, there can be NO tax owing for the years 1984 and 1985.

9. The only conclusion that can be drawn from Defendants' efforts, is that it was not procedurally correct to send that "Notice of Intent to Levy" until after the statutory assessment had been served upon Plaintiffs. And most importantly, within the 3 year time limit as mandated by Congress ! ! !

WHEREFORE, no where can it be found, either on Defendants' Form 23 C or on its' Form 4340, that Defendants, alleged assessment was stotutorily complete :

(a) Form 23 C failed to identify Plaintiff by name and/or number – Coson, supra, 286 F.2d 453, held :
"The district court had held squarely that there was NO assessment against the taxpayer because he was not named."

(b) Form 4340 failed to include the signature of the Assessment Officer, and failed to state the nature of the tax – IR Manual 5312 (1) MT 5300 - 1 says :

> "(1) The assessment is made by an assessment officer designated by the District Director or Service Center Director, as appropriate. The Assessment officer signs a Form 23 C Assessment Certificate, and this record, through supporting data, provides identification of the taxpayer by name and number, the taxable period, the nature of the tax and the amount assessed."

Note : Neither form had been furnished to the Plaintiff !

THEREFORE, the only conclusion that can be drawn from Defendants' FOIA material, is that a statutorily VALID assessment just does NOT exist. And until the tax has been properly and timely assessed, the taxpayer, Plaintiff in this instant case, canNOT be made liable :

> "And until the assessment has been made, the tax has not been found to be owing." In Re Western Trading Co., 310 F.Supp. 1130 (1972).

Notwithstanding the Service's contrary practice, the term assessment, as spelled out in the IRCode, has a technical meaning, which is held to be binding by the Courts. See US v. Miller 318 F.2d 637, (9th Cir.)

Thus, an invalid, or non-existant assessment is not the basis for establishing liability of a taxpayer. See Brafman v. US, 394 F.2d 396 (5th Cir. 1967).

The Brafman Court and the Court in Scar v C.I.R. 814 F.2d 1363 (9th Cir. 1987) held that :

> "The Treasury Regulations are binding upon the government as well as the taxpayer; tax officials and taxpayers alike are under the law, not above it."

The Scar and Brafman Courts adopted their language from US v Lehigh, 201 F.Supp. 234 (W.D.Ark. 1961), where the Lehigh Court held :

> „Any procedural defence is in a sense 'technical'. The procedures set forth in the Internal Revenue Code were prescribed for the protection of both government and taxpayer. Neglect to comply with those procedures may entail consequencess which the neglecting party must be prepared to face, whether such party be the taxpayer or the government,"
>
> Brafman @ 867

IN SUMMARY

The failure of the defendant to produce documents as are required to establish that there was, in fact, a Valid Assessment, must lead one to the inevitable conclusion that there was NO provable assessment to produce – thus, NO tax liability – thus, NO tax found to be owing by Plaintiff. See e.g. Interstate Circuit, Inc., v US, 306 US 208, 225 - 226, 59 S.Ct. 467, 473 - 74, 83 L.Ed. 610 (1939); Vanity Fair Paper Mills, Inc., v FIC, 311 F.2d 480, 486 (2nd Cir. 1962), Quoting Wigmoreon Evidence (3rd Ed. 1940). US v Philatelic Leasing, Ltd., 601 F.Supp. 1554-66, (S.D.N.Y. 1985).

Absent that statutory assessment, Notice and Demand, Defendants liening / seizing / selling of Plaintiffs' properties lay outside those statutes as are mandated by the Congress, and as such are NULL and VOID.

PRAY FOR RELIEF

THEREFORE, Plaintiffs, having properly established that the Defendant failed to furnish Plaintiff :

(a) a Procedurally proper and timely assessment;

(b) a Notice and Demand;

(c) a Notice of Seizure; and

(d) a Notice of Sale;

has on the Record established its claim for Relief, and by so doing MOVES this Court for SUMMARY JUDGMENT and, pursuant to 28 USC 2410, prays this Court to QUIET TITLE to Plaintiffs' Real and Personal Properties as described in Plaintiffs' original Complaint.

Respectfully submitted,

Raymond J. VanSkiver, Pro per

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAYMOND J. VAN SKIVER and
ALMA L. VAN SKIVER, Plaintiffs.

v. No. 89-1470-C

UNITED STATES OF AMERICA and
JOHN DOES, Defendants.

MEMORANDUM AND ORDER

This case comes before the court on the defendant United States of America's motion to dismiss the Plaintiffs' complaint on the grounds that this court lacks subject matter jurisdiction and on the grounds that plaintiffs' complaint fails to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). The Plaintiffs have filed a motion for default judgment on the ground that the defendant has not filed an answer. Under Fed. R. Civ. P. 12(b), a defendant who asserts a defense of lack of subject matter jurisdiction or failure to state a claim upon which relief can be granted, as the United States does here, has the option to assert these defenses by motion first rather than in a responsive pleading. Therefore, plaintiffs' motion for default judgment and plaintiffs' motion for hearing their default judgment motion are denied. The court will treat the plaintiffs' motion for default judgment as a response to defendants' motion to dismiss.

The plaintiffs' complaint states that the action before the court is an action for a wrongful levy, unauthorized disclosure, and to quiet title to certain real property on which the defendant claims/claimed a lien. The defendant moves to dismiss all three claims. The court initially notes that the dismissal of a complaint under Rule 12 (b) (6) "is proper if, taking all well - pleaded facts as true and construing them in the light most favorable to the plaintiff, it is clear that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." National Commodity and Barter Ass'n v. Gibbs, 886 F.2d 1240, 1244 (10th Cir. 1989), citing Grider v. Texas Oil and Gas Cas., 868 F.2d 1147, 1148 (10 th Cir. 1989). The issue in reviewing the sufficiency of the complaint is not whether a complainant will ultimately prevail, but whether the complainant is entitled to offer evidence to support the claims. Scheuer v Rhodes, 416 U.S. 232, 236 (1974).

WRONGFUL LEVY CLAIM

The defendant moves to dismiss the plaintiffs' wrongful levy claim for lack of subject matter jurisdiction. The plaintiffs allege that this court has jurisdiction under 28 U.S.C. 1346 (e) and 26 U.S.C. 7426. Section 7426 (a) (1) states in pertinent part :

> If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action again-

> st the United States in a district court of the United States. (Emphasis added).

It is clear from the language of the statute that the Sec. 7426 remedies are not available to the plaintiffs because they are the persons against whom the tax was assessed out of which such levy arose. See Shannon v United States, 521 F.2d 56, 59 (9th Cir. 1975), cert. denied, 424 U.S. 965 (1975). The court therefore grants the defendants' motion to dismiss the plaintiffs' wrongful levy claim brought under Sec. 7426.

UNAUTHORIZED DISCLOSURE CLAIM

The defendant moves to dismiss the plaintiffs' unauthorized disclosure claim for failure to state a claim upon which relief can be granted. The standards for dismissal of a claim pursuant to Rule 12 (b) (6) have been discussed above. Title 26 U.S.C. 6103 (a) states in relevant part :

> (r)eturns and return information shall be confidential, and except as authorized by this title . . . no officer or employee of the United States . . . shall disclose any return or return information obtained by him in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

If any such disclosure is knowingly, or through negligence, made in violation of Sec. 6103 by an officer or employee of the United States, then an aggrieved taxpayer may bring a civil action for damages against the United States pursuant to 26 U.S.C. 7431. The plaintiffs' complaint alleges that agents and officers of the United States willfully made unauthorized and illegal disclosures of plaintiffs' return and/or return information to certain third persons, including but not limited to the Wichita Eagle Newspaper, three local television stations, specifically named local bank, Wesley Medical Center (gleaned from a previous order to be Mrs. VanSkiver's place of employment), and the Sedgwick County Register of Deeds Office. The plaintiffs' state it was a violation of Sec. 6103 for the United States to file a Notice of Federal Tax Lien in the Sedgwick County Register of Deeds Office, with the intent that such information be disclosed to persons of interest, including title companies, lenders, credit reporting agancies, and other. In Flippo v. United State, 670 F.Supp. 638 (W.D.N.C. 1987), aff'd, 849 F.2d 604 (4th Cir. 1980), the district court noted :

> title 26 contains many exceptions to the probition [sic] against disclosure of 'returns and return information, including the information required to file proper notices of tax liens and to issue a levy and distraint upon any property or property rights belonging to the taxpayer. 26 U.S.C.A. Sections 6321, 6322, 6323 and 6331. The case bar deals with the disclosure of certain 'return information' through a notice of a tax lien filed in the Register of Deeds office in Catawba County, North Carolina and a notice of a tax assessment mailed to a bank in New York. Both acts are not only permitted but required by the statutes and the Regulations of the Internal Revenue Service when tax assessments have been made and unpaid.

670 F.Supp. at 641. To the extent that disclosure of Plaintiffs' returns and return information was made to the Sedgwick County Register of Deeds or to any entity in which the plaintiffs had property or property rights which were levied upon, the court finds as a matter of law that such disclosure did not violate 26 U.S.C. 6103, and that as to such entities the plaintiffs have failed to state a claim upon which relief can be granted. The defendant contends the entire claim is frivolous because the persons and/or entities named as having received information on the plaintiffs are public entities or private persons that have been part of the collection process with respect to the plaintiffs' delinquent tax liabilities. If by the phrase "collection process" the defendant means filing notices of tax liens and the issuance of a levy and distraint against plaintiffs' property or property rights, it is correct. The court is concerned however, about the plaintiffs' conclusory allegations that disclosure of their returns or return information was made to the Wichita Egale and to three local unnamed television stations. The court does not see how these entities were necessarily involved in the "collection process." Although the court's inclination is to dismiss the entire unauthorized disclosure claim as without merit, the court simply does not have enough facts before it to rule that the plaintiffs' have failed to state a claim upon which relief can be granted with regard to the news media mentioned. If an unauthorized disclosure as to plaintiffs' returns or return information was made to the media in violation of Sec. 6103, then the plaintiffs are entitled to damages under 26 U.S.C.

Sec. 7431 (a) (1). The court therefore grants in part, and denies in part, the defendants' motion to dismiss Plaintiffs' unauthorized disclosure claim. The court will only consider those unauthorized disclosure claims which do not involve the filing of proper notices of tax liens or assessments which are required and necessary to levy upon the property or property rights of the plaintiffs, wherever that property may be found.

QUIET TITLE CLAIM

The defendant contends that the plaintiffs' quiet title action should be dismissed as frivolous, for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The defendant's first argument is that under the holding of Falik v. United States, 343 F.2d 38 (2nd Cir. 1965), a quiet title action under 28 U.S.C. 2410 (a) was only meant to be maintained by secured creditors to clear title to real property by removing questionable or valueless government liens and was not available to the taxpayer himself. The Fifth Circuit has recently noted in Estate of Johnson, 836 F.2d 940, 944 (5th Cir. 1988), that judicial debate has taken place over the interpretation of Section 2410 (a) since the Falik decision. Much of that debate has been focused on the question of whether taxpayers are entitled to bring a quiet title action under 2410 (a). The Johnson court noted :

> The legislative history of section 2410 appears to suggest that the statute's framers envisioned the prime beneficiaries of section 2410 (a) (1) to be

> third parties claiming ownership or an interest in the property belonging to the taxpayer. Brosnan, 363 U.S. at 247 n. 11, 80 S.Ct. at 1114 n. 11; Falik, 343 F.2d at 41 - 42; Aqua Bar & Lounge v. United States Department of Treasury, 539 F.2d 935, 938 - 39 (3rd Cir. 1976). Several courts have found it to be equally apparent however, that Congress did not explicitly preclude taxpayer suits under section 2410. Id. at 938. The court in Aqua Bar noted that while Jackson's letter [concerning the 1941 amendment to section 2410, it was unprepared to construe his brief remarks to exhaust all the possibilities under the broad statutory language.

836 F.2d at 944, n. 12. (Brackets added). The Johnson court went on to note the courts which had held a taxpayer could maintain a quiet title action under Sec. 2410 to contest the procedural regularity of a lien but not the merits of the underlying assessment. 838 F.2d at 944 - 45. The plaintiffs respond to the defendant's initial argument by stating that they are not challenging the validity of the underlying assessment, but only the validity of those procedures used to enforce a tax lien or levy. The court has reviewed the plaintiffs' complaint, and after construing the facts pleaded in the light most favorable to the plaintiff, finds the plaintiffs are challenging the procedural regularity of various tax assessments, liens and sales. Therefore, under the rationale of Johnson, 836 F.2d 940, and Aqua Bar, 539 F.2d 915, the plaintiffs are entitled to maintain a quiet title action under Section 2410 (a) (1). See also Rodriquez v United States, 629 F.Supp. 333 (N.D.Ill. 1986); and Viva Ltd. v United

States, 490 F.Supp. 1002 (D.Colo. 1980). The court has jurisdiction over the quiet title action pursuant to 28 U.S.C. 2410 (a) (1) in combination with 28 U.S.C. 1340 and 1331. The second argument that defendant makes in connection with plaintiffs' quiet title claim is that the claim is an attempt to attack the assessments that have been made against them without meeting the statutory prerequisites to a refund suit. The plaintiffs have stated in their response that they are not challenging the underlying assessments, and the court intends to hold the plaintiffs to that statement. The defendant states that the frequency with which the plaintiffs file lawsuits (the plaintiffs have filed five other lawsuits in the last 8 years, all of which have been dismissed as frivolous or without merit), and the references in those lawsuits to actions performed by the defendant and correspondence received from the defendant demonstrates that the plaintiffs have been fully notified of their delinquent tax liabilities and of the collection activities of the defendant. The defendant has only attached two of the last five orders referred to in its brief, and neither order addresses the arguments the plaintiffs now make in reference to the procedural regularity of the assessments, liens, or sales. The fact that the plaintiffs have filed frivolous suits in the past on grounds unrelated to those now presented to this court does not warrant dismissing the quiet title claim for failure to state a claim upon which relief can be granted. The defendant's motion to dismiss the quiet title claim is denied.

IT IS THEREFORE ORDERED that plaintiffs' motion for default judgment and motion for hearing are denied.

IT IS FURTHER ORDERED that defendant's motion to dismiss plaintiffs' wrongful levy claim is granted.

IT IS FURTHER ORDERED that defendants' motion to dismiss plaintiffs' unauthorized disclosure claim is granted in part and denied in part.

IT IS FURTHER ORDERED that defendants' motion to dismiss plaintiffs' quiet title claim is denied.

IT IS FURTHER ORDERED that defendant file its answer to the plaintiffs' complaint within ten (10) days from the date of this order with regard to plaintiffs' quiet title claim and to that part of plaintiffs' unauthorized disclosure claim as discussed above.

Dated this 31st day of January, 1990, at Wichita, Kan.

Sam A. Crow, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAYMOND J. VAN SKIVER, et ux,
Alma L. VanSkiver, Plaintiff,

v. Case No. 89 - 1470 - C

UNITED STATES OF AMERICA, et al.,
and John Does, Defendant.

MOTION FOR DEFAULT JUDGMENT

COMES NOW the aforenamed Plaintiffs pursuant to Rule 7 (a) of the Federal Rules of Civil Procedures to move this Court for Judgment by Default on the ground that the Defendant has failed to answer the Plaintiffs' Complaint.

MEMORANDUM IN SUPPORT

The aforenamed Plaintiff moved this Court for a Judgment by Default on the grounds that the Defendant has failed to properly Answer Plaintiffs' Complaint as required by FRCP, 7 (a), wherein it states :

> "There shall be a Complaint and an 'Answer' . . . No other pleading shall be allowed . . ."

However, FRCP, 55 (e) clearly indicates that. :

> "No judgment by default shall be entered against the United States . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the Court."

I ATTEMPTS AT RELIEF

1. This is Plaintiffs' 6th complaint in the last eight years seeking Relief. However, each previous Complaint was immediately dismissed as being frivolous.

2. Not until Plaintiff came to understand that having gained permission from the IRS to sue the United States would not suffice. But rather, that one must first determine where in the Statutes the Congress has consented that the United States could be sued and/or where the Congress has waived its Sovereign Immunity.

3. The United States District Court for the District of Kansas in its Memorandum and Order in the case of Schmidt v King, 87 - 2612 - S (D.Kan. Sept 19, 1988) held that :

> "It is well established that the United States, as sovereign, is immune from suit, unless it consents to being sued."

Then, the Court went on to clarify that :

> "The consensus among these courts is that under 28 USC 2410 (a) (1), the United States has consented to suits which allege procedural defects in an IRS levy on property."

II JUDISDICTION ESTABLISHED

1. Plaintiff established this Courts jurisdiction over the subject matter within 28 USC 1331, 1340, 1346 (a), 1361 and 2463. Wherein each Statute refers to a Civil Action arising under any act of Congress providing for internal revenue and/or to compel the performance of a duty owed to the Plaintiff.

2. In addition, Plaintiff cites 28 USC 2410 and 2463, together with 5 USC 701 et. esq. which gives consent where the United States may be named as a party in any Civil Action, or suit, in any District Court to Quiet Title to real and/or personal property on which the United States has, or claims to have a lien.

3. All acts alleged herein transpired within the State of Kansas, therefore, jurisdiction of the United States Court as located in Wichita, Kansas, is properly founded in 28 USC 1391 (a).

4. To further establish Plaintiffs' claim to relief, the Supreme Court has held that 28 USC 2410 is a waiver of sovereign immunity by the United States for those situations which it covers. U.S. v John Hancock Mutual Life Insurance Co.,, 364 US 301, 81 S.Ct. 1, 5 L.Ed.2d 1 (1960). Section 2410 of the Judicial Code reads in part :

> "The United States may be named a party in any civil action or suit in any court . . . to Quiet Title to . . . real or personal property on which the United States has or claims a mortage or other lien."

The only question, then, is whether it covers Plaintiffs' suit for IRS improper procedure.

5. Several Circuits have already established that a section 2410 suit is an express waiver of sovereign immunity, when congressionally - mandated procedures are violated. In the case of US v Coson, 286 F.2d (9th Cir. 1961), the Coson Court stated :

> "It will be noted that our decision here is based upon our holding that the Governments' lien was irregular, insufficient and valueless from a procedural standpoint for failure to serve the statutory notice and demand in connection therewith and for failure to comply with required procedures." (Emphasis added)

6. Also, the Coson Court established 28 USC 1340 as giving District Courts original jurisdiction of a civil action where the issue involves the validity of the federal tax lien. In fact, the combination of 1340 and 2410 of 28 USC have been cited by numerous federal courts to firmly establish that an unequivocable waiver of sovereign immunity exists pursuant to 2410, and subject matter jurisdiction has been granted pursuant to section 1340, as Plaintiff questions only the validity of those procedures used to enforce a tax lien or levy and not the validity of the tax assessment itself. See US v Coson, supra; Aqua Bar & Lounge, Inc., v US Department of Treasury, 539 F.2d 935, 939 - 940 (3rd Cir. 1976); Pollack v US, 542 F.2d 421, 425 (7th Cir. 1976) ("Other remedies are available to contest a tax lien, including a suit to quiet title under 28 USC 2410 . . .").

7. Continuing with Judicial determinations in support, Benson v US, 442 F.2d 1221, 1223 n. 3 (D.C.Cir 1971) (Suit brought by a taxpayer against United States which challenges the validity of a federal tax lien and sale, sovereign immunity waived by section 2410.); Popp v Eberlin, 409 F.2d 309 (7th Cir. 1969); Smith v Malone, 88 - 2 USTC 9540 (W.D.Wash. 1988) (A levy

on salary can be challenged by a taxpayer based upon the IRS' compliance with assessment procedures pursuant to 28 USC 2410); Seattle Association of Credit Men v US, 240 F.2d 906 (9th Cir. 1957) (The section is not limited to property in which the title is capable of being registered, but applies to all property, including cash [including Plaintiffs' retirement, wages and wheat receipts]); Adler v. Nicholas, 166 F.2d 674 (10th Cir. 1948); Jones v Tower Production Co., 138 F.2d 675 (10th Cir. 1943); Wieland v Hummel, et al., File No. 87 - CV - 10368 - BC E.D.Mich. June 22, 1988); Schmidt v King. et al., Civil No. 87 - 2612 - S (D.Kan. Sept 29, 1988) (No court, however, has suggested that a procedural step can simply be omitted, let alone three of them); Ringer v Basile, 645 F.Supp. 1517 (D.Colo. 1986) (To extent that taxpayers' complaint, which challenged IRS' sale of her property in satisfaction of past - due taxes, was an action to quiet title, governments' sovereign immunity was statutorily waived.); Murray v US, 520 F.Supp. 1207, 1210 (D.N.D. 1981) (Sovereign immunity waived under 28 USC 2410); Viva Ltd. v US, 490 F.Supp. 1002 (D.Colo. 1980) (Federal lien arbitrarily and capriciously imposed because of procedural violations, e.g. , no assessment, no notice of assessment and no notice or demand for payment.); Yanniceli v Nash, 354 F.Supp. 143, 151 (D.N.J. 1973) Validity of lien challenged due to violation of procedural requirement.); Little River Farms, Inc. v US, 328 F. Supp. 475 (N.D.Ga. 1971); Sanders v Andrews, 121 F.Supp. 584, 593 (W.D.Okla. 1954); rev'd sub nom

Sanders v Commissioner, 225 F.2d 629 (10th Cir. 1955) (the court had jurisdiction to quiet title against liens asserted if under the record it is disclosed that the liens are invalid or the result of arbitrary and capricious conduct.

8. And most interestingly, the IRS itself, in a case where it wanted to assert its rights to funds seized from an alleged narcotics dealer by local police, successfully argued that a dispute over its levy could be removed to federal court under the section 2410 immunity waiver. Hudson County Board of Chosen Freeholders v Morales, 591 F.2d 379, 383 (3rd Cir. 1978).

9. Wherefore, Plaintiff has herein established that this action is NOT BARRED by any doctrine of sovereign immunity, the Anti-Injunction Act, 26 USC 7421, nor the Declaratory Judgment Act, 28 USC 2201. Such Statutes have NO application where, as herein, Plainttiffs challenges only the PROCEDURAL VALIDITY of the tax levy, as opposed to the merits of the IRS' alleged tax liability. The Rodriguez Court stated :

> "When an action challenges only the procedural validity of a tax levy, not the merits of the alleged tax liability, a federal district court has jurisdiction and can grant injunctive and declaratory relief. Congress has determined the procedure to which a taxpayer is entitled in the statutes which govern determination of deficiency, assessment and collection."

Rodriguez, 629 F.Supp. at 336. (Emphasis added) Accord.. Aqua, 539 F.2d 940; Benson, 442 F.2d @ 1223 n. 3, Yannicelli, 354 F.Supp. @ 151.

THEREFORE, Plaintiffs' action is properly construed as an action to quiet title within the meaning of section 2410 and consequently within that statute's waiver of immunity. Rodriquez, 629 F.Supp. at 339, citing Aqua, 539 F.2d at 939; Coson, 286 F.2d at 457; Viva, 490 F.Supp. at 1007; Yannicelli, 354 F.Supp. at 151; Little River Farms, Inc. v. US, 328 F.Supp. 476 (N.D.Ga. 1971); Roberts v US, 436 F.Supp. 560 (E.D.Tex 1977).

III SECT. 6213(a) SUPPORTS PLAINTIFF ACTION

1. Section 6213 (a) consents to a suit for injunctive relief for failure to notice at the initial stages of any IRS action. L.O.C. Industries, Inc., v US, 423 F.Supp. 265, 268 - 269, 274 (M.D.Tenn. 1976); Rodriguez, 629 F.Supp. at 338. Such conclusion follows from the language of the statute itself and from the Supreme Court decision in Laing v. US, 423 US 161, 96 S.Ct. 473, 46 L.Ed.2d 416 (1976). In Laing, the taxpayer alleged that the IRS had seized cash belonging to him without following the procedures for a jeopardy determination and sought "an injunction against (its) continued possession by the IRS." Laing v US, 364 F.Supp. 469, 470 (D.Vt. 1973). Also, the Supreme Court did not specifically characterize the issue as one of immunity, it expressly grounded the taxpayers right of action on section 6213. Laing, 423 US at 185 n. 27, 96 S.Ct. at 486 n. 27. The section reads in pertinent part :

> "Except as otherwise provided (by the procedure for jeopardy assessment), no assessment of a deficiency in respect of (income, state or gift taxes), and

> no levy or proceeding in court for its collection shall be made, begun or prosecuted until notice (of deficiency under section 6212) has been mailed to the taxpayer . . .(T)he making of such assessment or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."
>
> 26 USC 6213 (a)

The statute that expressly consents to a suit for injunctive relief when the IRS has levied on property without following the congressional - mandated procedures.

2. Additionally, the court in L.O.C., 423 F.Supp. 268 - 269, 274, following Laing, so interpreted section 6213, finding that sovereign immunity did not bar a suit to have an IRS levy on the plaintiffs' bank account set aside for insufficient notice. Plaintiff here makes essentially the same claim. Section 6213 is, of course, part of the IRCode, and a suit under it clearly falls within the jurisdictional grant of 28 USC 1340. See also Clark v Campbell, 501 F.2d 108, 111 - 113 (5th Cir. 1974); McGee v US, 380 F.Supp. 801, 802 (N.D.Ind. 1974)

3. However, in the case of Martinez v US. 669 F.2d 586 (9th Cir. 1981); the appellant had filed a claim for refund in 1973, which was denied. A suit followed, the district court gave the government summary judgment. On appeal, appellant made several claims, but the Ninth Circuit did not actually address them because the seizure procedures used were improper. Martinez, 669 F.2d. at 569. The Court said :

"Although styled as a refund suit, Martinez' suit more closely resembles a tort claim for conversion. A refund suit is generally based on an argument between the taxpayer and the IRS about how his tax liability is calculated. Martinez challenges neither the calculation of nor his liability for the tax. He is challenging only the manner in which the government took his property in payment."

4. The Ninth Circuit in Martinez, and the Supreme Court in Commissioner v. Shapiro, 424 US 614, 96 S.Ct. 1062, 47 L.Ed.2d. 278 (1976), discussed infra, did not specify where they would have found a waiver of immunity, but such suits could not be heard without it. therefore, immunity is not a barrier when the IRS violates congressionally - mandated procedures.

IV PLAINTIFF'S ACTION WITHIN AMBIT OF THE EXPRESS EXCEPTIONS TO THE ACT

1. The Anti-Injunction Act, 26 USC 7421, which says that except for actions under eight specified statutory provisions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." does not apply in the instant case.

2. For the condition precedent of liability to be met, there must be a lawful assessment, either a voluntary one by the taxpayer, or one procedurally proper by the IRS Bothke v Flour, 713 F.2d 1405 (9th Cir. 1983)

3. Therefore, according to the IRCode, there are certain statutory procedures that the IRS must follow in the process of administratively collecting taxes. See US v Berman, 825 F.2d 1053, 1055 (6th Cir. 1987).

> "These statutory procedures include the making of an assessment against the taxpayer, 26 USC 6203, and mailing a notice of assessment and demand for payment to the taxpayer, 26 USC 6303 (a)."
> Berman, 825 F.2d at 1055.

4. By its own language, the exemptions thereto, e.g. 6212 (a) and 6213 (a), and the language of 6213 (a), the Anti-Injunction Act does not apply to a taxpayer's suit to enjoin a levy imposed when the IRS violates congressionally-mandated procedures. The Ninth Circuit in the case of Jensen v IRS, 835 F.2d 195 (9th Cir 1987) said :

> "Once a taxpayer satisfies one of the statutory exceptions to the Act, he is no longer jurisdictionally barred from seeking an injunction. See Perlowin v Sassi, 711 F.2d 910 911 (9th Cir 1983). Here, the IRS' failure to comply with the notice provision of 26 USC 6212 (a) and 6213 (a) before levying on Jensen's wages constitutes an exemption to the Act. Section 6213 (a) expressly provides that a levy may be enjoined 'notwithstanding the provisions of section 7421 (a)'. The district court had jurisdiction to hear Jensen's suit. See Laing v US, 423 US 161, 184 n. 27 (1975); Perlowin, 711 F.2d @ 911."

5. Courts which have characterized suits against a lien or levy, like the present one, as a quiet title action have

also seen no barrier to them in the Anti-Injunction Act. A quiet title action simply is not a suit to restrain the assessment or collection of tax. Otherwise, section 2410 which was enacted well after the original Anti-Injunction Act, would be impossible to reconcile with section 7421. Aqua, 539 F.2d at 940; Coson, 286 F.2d @ 468-469. The Coson Court had this to say :

> "We agree with the holding of the trial court that the prohibition against suits to restrain collection or assessment of taxes has no bearing upon this case which is one for a wholly different purpose. We think it plain that the only type of relief needed here is a decree holding the tax lien a cloud on plaintiffs' title and cancelling it. There is no need for any injunctive relief. We hold that the court below had jurisdiction." Coson 285 F.2d at 459

It should be noted that the Coson Court did not rule out Injunctive relief. See Coson 286 F.2d at 459 n. 9.

V OTHER MANDATED NOTICES INCLUDED

1. Not to be overlooked, the United States Supreme Court has extended the exception in the Anti-Injunction Act to include cases where the levy was made without the section 6303.(a) notice of assessment and demand for tax as required by section 6331. In Shapiro, the IRS had made a jeopardy assessment and levy which the taxpayer alleged had been issued without Notice and Demand for tax. Unlike a regular levy, defective notice in a jeopardy proceeding can be cured by post-levy notice within 60 days of assessment, 26 USC 6861. The IRS had sent such belated notice. The Court, however, stated

that compliance with the notice and demand procedures was necessary if the Anti-Injunction Act were to apply. Otherwise, section 6213(a) would permit suit. Shapiro, 424 US at 617-619 n. 7, 96 S.Ct. at 1068 n. 7.

2. Thus, extending the exception of the Anti-Injunction Act to include the section 6303 notice and demand for tax also fits the rationale of that Act. The concern of the statute prohibiting injunctions against tax assessment or collection, as construed by the Supreme Court, is with pre-enforcement suits seeking injunctive relief, suits which would directly halt the process of assessment or collection. Thus, the statute applies to injunctions which would be grounded on disputes over the right to tax or the amount to be assessed or collected. Bob Jones Uni. v. Simon, 416 US 725, 731-732, 94 S.Ct. 2038, 2043-2044, 40 L.Ed.2d. 496 (1974); Enochs v Williams Packing & Navigation Co., 370 US 1,7, 82 S.Ct. 1125, 1129, 8 L.Ed.2d 292 (1962). These concerns are not at issue when, as here, the enforcement has already taken place. When a taxpayer who alleges that proper procedures has not been followed, seeks relief from an illegal act of enforcement, section 7421 does not apply See Yannicelli, 354 F.Supp. at 151. Thus, the court in L.O.C., following Shapiro, enjoined the levy on funds in the taxpayer's bank account which had issued before the taxpayer had received a section 6393 notice and demand for tax. UNLESS the Notice - and - Demand requirements for levy set out in section 6331 are met, section 7421 will not block an injunction. L.O.C.

423 F.Supp. at 272-273. Even if Plaintiff were only entitled to a section 6303 notice of assessment and demand for tax, Plaintiff, in this instant action, is not barred from injunctive relief had the seizure and sale not already taken place.

VI SECTION 2410 VIOLATIONS OF DUE PROCESS

1. By permitting a taxpayer to invoke 28 USC 2410 to challenge the validity of the way in which the Internal Revenue Service has enforced a tax lien and levy, the courts are simply examining possible violations of an individual's rights that have occured during the course of the administrative assessment / collection process. Yannicelli at 157. A federal tax lien and levy might be held irregular, insufficient and invalid for failure by the IRS to comply with statutory procedures, thereby violating the Fifth Amendments' guarantee of due process. See US v. Bonaguro, 294 F.Supp. 750 (E.D.N.Y. 1968). Aff'd 428 F.2d 204 (2d Cir. 1969), cert. den'd, 400 US 829, 91 S.CT. 57, 27 L.Ed.2d 59 (1970); Transport Mfg. & Equipment Co. of Delaware v Trainer, 382 F.2d 793 (8th Cir. 1967); and US v Hoffner, 420 F.2d 809, 812 (4th Cir. 1970) ("The failure of the Board and of the Department of Justice to follow their own established procedures was held a violation of due process.")

2. Without exception, each agency of the government must scrupulously observe rules, regulations, and/or procedures which it has itself established. When it fails to

follow its own procedures, its action cannot stand and courts will strike it down. Heffner, 420 F.2d at 811; Lojeski v Boandle, 788 F.2d 196, 86-2 USTC 9494 (3d Cir. 1986) (the circuit court stated that it recognized that "a violation by an agency of its own rules can provide a basis for reversal of the agency action." The remedy is the invalidation of agency action, and the bsais is federal administrative law rather than constitutional law. Id., discussing administrative law cases such as Accardi v Shaughnessy, 347 US 260 (1954)).

VII ORIGINAL ACTION CITES PROCEDURAL OMISSIONS

1. In Plaintiffs' original Complaint, Plaintiffs challenged the procedural omissions as were committed by the IRS as was noted therein at Count I and Count II, to wit : Failure to assess, failure to issue a statutory Noitce of Assessment and Demand, failure to seize property within the meaning of 26 USC 6335 (a) & (b), and failure to notice Plaintiff of said tax sale in violation of 26 USC 6335 (b) and 26 C.F.R. 301.6335 - 1 (b) (1).

2. During the course of controversy with the Service Plaintiff asked for a copy of the alleged assessment in 1982, but none was forthcoming. Sought an abatement in 1984 based upon the lack of Notice and Demand. Interestingly, the FOIA request even produced a document where the service actually confessed that NO assessment had been made. Additionally, as found therein, the required Form 23 C, failed to provide identifi-

cation of the taxpayer by name and/or number, the taxable period, the nature of the tax and/or the amount assessed against said taxpayer. (See exh.p. 94 a - 108 a)

> "The district court had held squarely that there was no assessment against the taxpayer because he was not named."Coson supra, 286 F.2d 453

THEREFORE, the only conclusion that can be drawn is that a VALID assessment just does not exist. And not until the tax has been properly and timely assessed will the taxpayer be liable for such tax.

> "And until the assessment has been made, the tax has not been found to be owing."
> In Re Western Trading Co., 310 F.Supp. 1130 (1972)

VIII THE ASSESSMENT PROCEDURE

1. The assessment authority of the Secretary of the Treasury contained in IR Section 6201)a) is to make inquiries, determinations, and assessment of all taxes. The procedure or method for making an assessment is set out in IRCode section 6203-as follcws :

> The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon a request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the assessment.

2. And as authorized under IRCode section 6202, the Secretary has promulgated regulation Section 301.-6203 - 1 to clarify the procedure as follows :

> The district director and the director of the reginal service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment . . . The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of the assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

3. Also, the Treasury has further explained the procedure for making the assessment in IR Manual 5312 (1), MT 5300 - 1 (11/15/85) (attached hereto @ p. 102 a - 103 a), which states in part :

> (1) The assessment is made by an assessment officer designated by the District Director or Service Center Director, as appropriate. The assessment officer signs a Form 23 C Assessment Certificate, and this record, through supporting data, provides identification of the taxpayer by name and number, the taxable period, the nature of the tax and the amount assessed.

Wherefore, the act of "assessment is merely the official act of recording on a list the liability of a taxpayer." Saltman, IRS Practice and Procedure, section 14.06 p. 14 -

27 (1981). See also, IRCode, section 6203. IR Manual 5312 (3), MT 5300 - 1 (11/15/85), appendix III, states that "(t)he assessment lists support the assessment certificate, which is used to summarize and record the official action of the assessment officer." Numerous other authorities have also explained the method of making an assessment, that is, recording a taxpayer's liability. The mechanics of which consist of including on the Accounting assessment Journals the identification of the taxpayer by name and number, the taxable period, nature of the tax, and the amount assessed.

> The method of making an assessment – that is, recording a taxpayer's liability – does not materially change whether the assessment is a normal, deficiency, jeopardy, or bankruptcy assessment . . . (T)he admitted liability of the taxpayer is entered on an assessment list with his name, and identifying number, the taxable period, and the type of tax.
>
> On any date, the total tax liability of all taxpayers for each type of tax to be assessed on that day is summarized on Form 23 C, 'Assessment Certificate'. It sets forth the types and amounts of tax to be assessed on the date. When signed by an assessment officer in the service center, it constitutes an assessment for purposes of the Code. M.Saltzman, IRS Practice and Procedures, section 10.02 (1981).
>
> The assessment is made when the appropriate offical in the director's office (or service center) signs a summary record sheet which contains the taxpayer's name, address, the amount of the tax, the type of tax and the taxable period." 34 Am.Jur. 2d. Federal Taxation, section 9122 (1986).

> An assessment occurs when a Revenue Service assessment officer signs a summary record which is supported by a list that identifies the taxpayer, the type of tax, the amount assessed, and the taxable year or period to which it relates. The assessment date is the day on which the summary record is signed. Mulroney, Federal Tax Exam. Manual, section 12.4 (a) (1986).
>
> Under the Code, the assessment is made by recording the taxpayer's name, address, and tax liability, and the date of assessment is the date the summary record is signed by an assessment officer. Internal Revenue Manual (CCH Vol. 8, p. 62,017) section 5308 (1983).

See also H. 1337, 83d Cong., 2d Sess. A405 (1954); 9 Mertens, Federal Income Taxation, sections 49.81, 49.186 (1985) : William D. Elliott, Federal Tax Collection, Liens, And Levies, section 2.4 (1988).

4. Thus, from the foregoing statute, regulation, manual provisions, and treatises, each of the following must be performed before there can be an assessment to support any Federal Tax Lien. These steps are as follows :

1. Determination of a deficiency;

2. Inclusion on the Accounting Assessment Journals of the identification of (1) the taxpayer by name and number, (2) the taxable period, (3) the character of the assessed liability, and (4) the amount assessed.

(a) The original assessment must identify the taxpayer by name and by number or the assessment is inapplicable to that taxpayer. Ianelli v Long, 329 F.Supp. 1241, 1242 (W.D.Pa. 1971); Coson v US, 169 F. Supp. 671 (S.D.Cal. 1958), Aff'd without discussion on this point 286 F.2d 453 (9th Cir. 1961).

(b) If the assessment does not refer to the correct taxable period, the courts will invalidate the assessment. Treas. Reg. 301.6203 - 1 (1961); US v Lehigh, 201 F.Supp. 224 (W.D.Ark. 1961).

(c) The phrase "character of the liability assessed" indicates (1) whether the liability is for a tax, interest, or penalty and (2) the basis for the assessment. Heck v Walters, 523 F.2d 23, 24 (9th Cir. 1975); LaFollette v US, 173 F.Supp. 388, and 176 F.Supp. 192 (S.D. Cal. 1959).

(d) The amount of the assessment is the tax shown on a supporting list. Treas. Reg 301.6203 - 1 (1961).

3. Transferring the totals of each Accounting Assessment Journal to the Assessment Certificate, Form 23 C.

4. Designation of assessment officers by a delegation order.

5. Execution of the Assessment Certificate by an Assessment Officer.

5. The United States did not deliver to Plaintiffs any such documents that might indicate to the Plaintiffs that a valid assessment had been made against the Plaintiffs. Nor did the FOIA information produce any such documents, even though the Plaintiffs had asked, in 1982, for the assessment and/or is entitled to such an assessment according to IRCode section 6203. In fact, just the

opposite was established as the FOIA information revealed an inter - office Memo stating that the assessment had NOT yet been made. (See Exhibit p. 98 a.).

6. The basis of collecting a tax liability is the assessment. The assessment is an administrative creation of the tax liability; "and until the assessment has been made, the tax can not be found owing." Bull v US, 295 US 247 (1935); In re Western Trading Co., 340 F.Supp. 1130 (D.Nev. 1972). For a tax liability to be duly collectible, it must have been properly assessed. Estate of Goetz v US, 286, 131 (D.Mo. 1968).

7. According to the Internal Revenue Code, there are certain statutory procedures that the IRS must follow in the process of administratively collecting taxes. See US v Berman, 825 F.2d 1053, 1055 (6th Cir. 1987) ("These statutory procedures include the making of an assessment against the taxpayer, 26 USC 6203, and mailing a notice of assessment and demand for payment to the taxpayer, 26 USC 6303(a)"). Berman, 825 1055.

8. The term 'assessment' has a technical meaning as spelled out in the IRCode, which is binding upon the Courts. US v Miller, 318 F.2d 637, 638 (7th Cir.) An invalid or non-existent assessment is not the basis for establishing liability of a taxpayer. Brafman v US, 394 F.2d 963 (5th Cir. 1967). The Brafman Court and the Court in Scar v C.I.R., 814 F.2d 1363, 1370 n. 13 (9th Cir. 1987), held that "(t)he Treasury Regulations are binding upon the Government as well as the taxpayer;

Tax officials and taxpayers alike are under the law, not above it." Id. at 866. The Scar and Brafman Courts adopted the language from US v Lehigh, 201 F.Supp. 224, 234 (W.D.Ark. 1961), as the Lehigh Court held :

> "Any procedural defense is in a sense 'technical'. The procedures set forth in the Internal Revenue Code were prescribed for the protection of both Goverment and taxpayer. Neglect to comply with those procedures may entail consequences which the neglecting party must be prepared to face, whether such party be the taxpayer or Goverment. Brafman, at 867

9. In addition, the IRS must follow the administrative process established by its internal procedures. "An agency of the government must scrupulously observe rules, regulations, or procedures it has established. When it fails to do so, its action cannot stand and courts will strike it down. US v Heffner, 420 F.2d 809, 811 (4th Cir. 1970). "This is so even where the internal procedures are possibly more rigorous than otherwise would be required." Lojeski v Boandl, 788 F.2d 196, 86-2 USTC 9494 (3rd Cir. 1986) citing Morton v Buiz, 415 US 199, 135 (1974).

IN SUMMARY

1. To date, Plaintiffs' Complaint remains unanswered since a Motion to Dismiss can not be considered an Answer. Thus, the Defendant has not bothered to follow the rules as set down by this Court, nor has the Defendant bothered to adhere to its own rules, regulations and/or procedures as set forth within the IRCode.

2. Therefore, in light of the fact that Plaintiffs asked for, but did not receive, that alleged assessment back in 1982; and the fact that the Plaintiff did ask that the alleged tax be abated for failure of Notice and Demand in 1984 and 1985; the Service did err by its failure to deliver to Plaintiffs that required Assessment and/or that required Notice and Demand, or that required Notice of Seizure, or that required Notice of Sale (See p. 141 a, item 1).

3. Thus, the failure of the defendant to produce such documents as are required to establish that there was an assessment must lead this Court to the inevitable conclusion that there was NO provable assessment, and therefore NO liability was ever owed by the Plaintiffs. See e.g. Interstate Circuit, Inc. v US, 306 US 208, 225-226, 59 S.Ct. 467, 472-74, 83 L.Ed. 610 (1939); Vanity Fair Paper Mills, Inc. v FTC, 311 F.2d 489, 486 (2d Cir. 1962), Quoting Wigmore on Evidence (3rd Ed. 1940), US v Plfiatenc Leasing, Ltd., 601 F. Supp. 1554, 1565-66, (S.D.N.Y. 1985).

4. The Secretarys' failure to send to the Plaintiffs that alleged assessment when asked back in 1982 nullifies any action the Service may have taken to collect the alleged amount allegedly assessed. Absent that required assessment, NO lien can arise, nor can any levy be effective, absent that required Notice and Demand. See Jersey Shore State Bank v US, 107 S.Ct. 782 (1987); US v Berman, 828 F.2d 1053, 1055 (6th Cir. 1987); US v Jersey Shore State Bank, 781 F.2d 974 (3rd Cir. 1986); US v Associates Commercial Corp., 721 F.2d 1094 (7th Cir. 1983); Bauer v Foley, 404 F.2d 1215 (2d

Cir. 1968), on rehearing 408 F.2d 1331 (1969); US v Ball, 326 F.2d 898, 901 (4th Cir. 1964); Jenkins v Smith, 99 F.2d 827 (2d Cir. 1938).

5. And since there was NO lawful Assessment made by the Service, any and all information that may have been released by the service concerning Plaintiffs' Return would amount to an Unauthorized Disclosure – even the release of Plaintiffs' name.

PRAY FOR RELIEF

THEREFORE, absent that required ANSWER, Plaintifs having properly established its claim for Relief, MOVES this Court for an ORDER of Judgment by DEFAULT and prays this Court to QUIET TITLE to Plaintiffs' Real and Personal Properties as are described in Plaintiffs' original Complaint pursuant to 28 USC 2410.

Dated this 13th day of November, 1989

Respectfully submitted,

Raymond J. VanSkiver, Pro Per.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

RAYMOND J. VAN SKIVER, et ux,
Alma L. VanSkiver, Plaintiffs,

v. Case No. 89 - 1470 - C

THE UNITED STATES OF AMERICA, et al.,
and John does, Defendants.

COMPLAINT & DEMAND FOR JURY TRIAL
QUIET TITLE ACTION
WRONGFUL LEVY
UNAUTHORIZED DISCLOSURE

COMES NOW the aforenamed Plaintiffs and for cause of action against the aforenamed Defendants states as follows :

I. This is an action for a wrongful levy, unauthorized disclosure and to Quiet Title to certain real property on which Defendant United States claims / claimed a lien.

II. Plaintiffs, Raymond J. VanSkiver, et ux Alma L. VanSkiver, are natural individuals, American by birth, and at all times pertinent to this action domiciled in the State of Kansas, County of Sedgwick.

III. Defendant United States of America is a resident corporation in the United States of America.

IV The true names or capacities, whether individual, corporate, associate, or otherwise, of defendants named herein as John Does, are unknown to Plaintiffs, who sue said defendants by such fictitious names, and Plaintiffs will amend this Complaint to show their true names and capacities when the same have been ascertained.

V. This Court has jurisdiction over the subject matter of this action pursuant to 28 USC 1331, 1340, 1346 (e), 1361 and 2463. The United States has consented to be sued in this action by virtue of 28 USC 2410 and 2463, 28 USC 7426 and 7431, and 5 USC 701 et seq.

VI. All acts alleged herein transpired within the State of Kansas, therefore, venue is properly set herein pursuant to 28 USC 1391 (b), because the alleged claims arose within the judicial district of Kansas.

VII. The property to which the defendant, United States, claims / claimed a lien upon and this action relates is commonly known as :
House and lot at 2220 N. Cedar Crest Drive, Sedgwick County, Kansas; described as –

Lot 1, Block 2, Cedar Downs First Addition, Sedgwick County, Kansas; Notice of Seizure posted on door 28 June 1989 – Lien not on file in County Court House.

34 Lots, located in Cedar Downs 3rd Addition, Sedgwick County, Kansas, described as –

Block B, lot numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, and 12.
Block C; lot numbers 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, & 23.

Together with a large lot in the SE 1/4 of Sec. 1 - 27 - 2W, approx 5 acres; beginning :

680 Ft. West, in the SE Quarter of Sect. 1, Township 27 S. Range 2 W, Thence N 660 Ft., Thence E 330 Ft., Thence S 660 Ft., Thence W 330 Ft. to point of beginning.

Notice of Seizure 13 January 1987 – Lien filed 30 April 1986; Date of Sale about 12 March 1987 – [NO Notice of Seizure given to Mrs VanSkiver] NO Notice of Sale given to [either] Plaintiff.

House and lot at 2601 N. Cedar Crest Drive, approx 2½ acres, located in the SE ¼ of Sec. 1, Twp. 27 S. R - 2 - W, of the 6th PM, Sedgwick County, Kansas, and begining at the NE Corner of lot 2, block B, of Cedar Downs Second Addition at Cedar Crest Drive; Thence, NW 54 degrees 31' 34" 103.22 Ft. Thence West 295.66 Ft.; Thence North 330 Ft., Thence East 244.44 Ft. Thence, Southeasterly 325.06 Ft. to 2 points on the West line of lot 1, Block A, Cedar Downs Third Addition; Thence, South East 54 degrees 31' 34" 88.89 Ft., Thence, South West 40 Ft. (following Cedar Crest Dr.) to point of beginning.

Notice of Seizure about April 1983 – Lien no longer on file. NO Notice of [Seizure] / Sale given to [either] Plaintiff.

Personal Property :

The Kansas Public Employees Retirement System Account No. SW52880 of Plaintiff, Raymond J. VanSkiver, No Notice given to Said Plaintiff.

Wages for labors at the Wesley Medical Center, Wichita, Kansas, as was performed by Plaintiff Alma L. Van Skiver. Notice of Seizure unknown – No Notice ["given"] to Plaintiff Alma L. VanSkiver – (however Plaintiff Alma L. VanSkiver was later informed by her employer that said seizure Notice was made to said employer over the telephone.)

The proceeds from the sale of wheat to the Andale Co-op Colwich, Kansas. Seizure made only after Co-op Manager contacted the IRS Office – thus, NO Notice given to Plaintiffs.

- Monies paid in as the result of Audit : $15,942.91.

VIII. Each of the aforementioned Notices were filed with the Register of Deeds Office, of Sedgwick County, Wichita, Kansas. Said Notices were prepared and filed by the Internal Revenue Service Officers located at Wichita, Kansas.

IX. Until the seizure of the properties as described above, Plaintiff Raymond J. VanSkiver and Alma L. Van Skiver were the owners of such property in fee simple. Except for the house located at 2220 N. Cedar Crest Drive. This property is owned by the children of the Plaintiffs.

COUNT I

X. The United States, claiming that Plaintiffs had failed to pay a 1040 tax, seized Said propertites on an unknown date, under the apparent authority of 26 USC 6331. Defendant, United States has sold all the properties except that of 2220 N. Cedar Crest Drive. But plans to sell this remaining property to satisfy the remaining [alleged] amount which was not satisfied when the other properties were sold. The United States claims Plaintiff have a remaining tax debt for the years of 1980 through 1984 of some $10,000.00.

XI. The United States had no power to seize the property under 26 USC 6331 and 26 C.F.R. 301. 6331 - 1, since it failed to formally assess a tax against Plaintiffs as required by IRCode section 6203 and Treas. Reg. 301.6203 - 1 for the years ending 1975 through 1984.

XII. The United States had no power to seize the property under 26 USC 6331 and 26 C.F.R. 301. 6331 - 1, since it failed to issue a statutory Notice of Assessment and Demand for Payment, and has not to date "given" or mailed to Plaintiff a Notice and Demand, which was required by IRCode section 6303 (a) for the years ending 1975 through 1984.

XIII. The United States had no power to seize the property under 26 USC 6331 and 26 C.F.R. 301. 6331 - 1, since it failed to issue a statutory Final Notice and Demand to Plaintiff Raymond J. VanSkiver and/or Alma L. VanSkiver, and has not to date "given" or mailed to Plaintiff Raymond J. VanSkiver and/or Alma L. VanSkiver a Final Notice and Demand, which was required by IRCode section 6331 (d) for the years ending 1975 through 1984.

XIV. The United States agents, Revenue Officers, William H. Byrant and/or Charles I. Tincher, had no power to seize the properties under 26 USC 6331 and

26 C.F.R. 301.6331 - 1, since neither William H. Byrant nor Charles I. Tincher have been delegated the authority to seize real property as required by law.

COUNT II

Plaintiffs reallege and reaver the allegations and averments contained in paragraphs I through XIV inclusive which are incorporated herein by this reference as though set forth in full.

XVI. The United States erroneously and illegally seized the property within the meaning of 26 USC 6335 and 26 C.F.R. 301.6335 - 1, since it failed to serve / ["personally give"] the required notice of [seizure] / sale [to Plaintiffs] within the precise strictures of IR Code sections 6335 (a) & (b) as required.

XVII. The United States erroneously and illegally seized the property within the meaning of 26 USC 6335 and 26 C.F.R. 301.6335 - 1, since it scheduled the sealed bid sale less than ten (10) days from giving public notice under 26 USC 6335 (b) in violation of 26 USC 6335 (d) and 26 C.F.R. 301.6335 - 1 (c)(1).

XVIII. Since the lien claimed by the United States on the above described property was without validity, the United States had no right, title, or interest in the Plaintiffs' property, thus the United States had no right or authority to seize such property.

COUNT III

UNAUTHORIZED DISCLOSURE

XIX Plaintiffs reallege and reaver the allegations and averments contained in paragraphs I through XVIII inclusive which are incorporated herein by this reference as though set forth in full.

XX. On, or about, February 10, 1983, and at other times unknown to Plaintiffs, but within two years of discovery, and continuing through the present, the United States, acting through its agents and officers, willfully made unauthorized and illegal disclosures of Plaintiffs' Return and/or Return Information in violation of Title 26 USC 6103, and Title 26 USC 7431, in that the IRS did willfully and wrongfully make disclosures of Plaintiffs' Returns and/or Return Information to third persons, including, but not limited to, the News Media, i.e., The Wichita Egale Newspaper, three local TV Stations, local Banks in and around the city of Wichita, i.e., The First National Bank of Wichita, Kansas, the Maize State Bank of Maize, Kansas, the Colwich State Bank of Colwich, Kansas, as well as Banks in and around the Newton Kansas area; the husband and wife, their attorneys, abstract companies, credit unions, and/or lending agencies, of the some 35 Building sites previously sold to them; The Wesley Medical Cender of Wichita, Kansas. The Kansas Public Employees Retirement System of Topeka, Kansas, The Andale Co-op of both Colwich and Andale, Kansas, not to mention their some 30 employees, The 20 or more prospective bidders and/or their attorneys who attended the alleged tax sales, the some 12 employees who work in the Sedgwick County, Kansas Register of Deeds Office, including the many Abstract Company workers who frequent that Office, and other individuals, through the uses of levies and/or other correspondence, etc., for the taxable years ending in 1975 through 1984.

XXI. In addition thereto, and in violation of Title 26 USC 6103, Defendant United States did cause that a Notice of Federal Tax Lien be filed in the official records of the County of Sedgwick, Kansas, with the intent that such information be disclosed to persons of interest including Title Companies, lenders, credit reporting agencies, and other. Plaintiffs are informed and believe that such additional information was willfully disclosed and released in direct violation of Title 26 USC 6103 and Title 26 USC 7431, including that of verbal disclosures of Plaintiffs' Return Information to third persons concerning the taxalbe years ending in 1975 through 1984.

XXII. At all times, the defendant United States, acting through its agents, officers and employees, knew and had reason to know that such unauthorized disclosures of information were, in fact, improper and illegal, and would result in damage to the Plaintiffs.

XXIII. The information referred to above, and the information released by the defendant United States, constituted return and/or return information, as described in Title 26 USC 6103 (b).

XXIV. The disclosures of such information was, in fact, willfil! and/or result of gross negligence, and was not the result of good faith interpretation of Sec. 6103 in that the disclosures were clearly prohibited by law.

XXV. The extent and number of how many actual unlawful disclosures defendants have made with regard to Plaintiffs are actually unknown. However, the damages described in Title 26 USC 7431 (c)(1), Plaintiffs, and each of them, are entitled to punitive damages in an amount to be ascertained. This Complaint will be amended as it becomes necessary and such other damages are ascertained.

PRAYER

WHEREFORE, Plaintiffs pray relief and judgment :

1. For judgment declaring that said lien, levy, seizure and sale are Void;

2. That defendants, and each of them, and all persons claiming under them, be required to set forth the nature of their claims to said real and/or personal properties ;

3. That all adverse claims to said real and/or personal property be determined by a decree of this court ;

4. That said decree declare and adjudge that Plaintiffs Raymond J. VanSkiver et ux Alma L. VanSkiver, owns in fee simple, and is entitled to the quiet and peaceful possession of, said real property, along with all personal property as was allegedly seized ; and that defendants,

and each of them, and all persons claiming under them, have no estate, right, title, lien or interest in or to said property, both real and/or personal, or any part thereof;

5. That said decree declare that the lien and levy are wrongful and issue an order permanently enjoining defendants, each of them, and all persons claiming under them, from asserting any adverse claim to plaintiffs' Title to said properties ;

6. That the Court enjoin John Does from having title to the property transferred to them and from exercising any ownership rights with respect to such properties ;

7. That Plaintiffs, each of them, be awarded damages for the unauthorized disclosures of their tax return or return information in an amount to be ascertained at trial, according to proof ;

8. That Plaintiffs be awarded punitive damages according to proof ;

9. Granting plaintiffs their costs of this suit ; and

10. Granting Plaintiffs such other and further relief as the court may deem just and proper.

Dated this 25th day of August, 1989.

Raymond J. VanSkiver et ux Alma L. VanSkiver

Respectfully submitted

Raymond J Van Skiver

Raymond J. VanSkiver

JURY TRIAL DEMAND

Plaintiffs hereby demand trial by the jury on all issues triable as of right before a Jury in this civil action.

Raymond J Van Skiver

Raymond J. VanSkiver

Alma L. Van Skiver

Alma L. VanSkiver

VERIFICATION

STATE OF KANSAS

ss

COUNTY OF SEDGWICK

I, RAYMOND J. VAN SKIVER et ux Alma L. VanSkiver, declare under penalty of perjury, pursuant to 28 U.S.C. 1746, that the foregoing is true and correct to the best of our belief and knowledge.

Executed on this .... day of August, 1989, at Wichita, Kansas.

Raymond J Van Skiver

Raymond J. VanSkiver

Alma L. Van Skiver

Alma L. VanSkiver

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAYMOND J. VAN SKIVER
and ALMA L. VAN SKIVER, Plaintiffs,

v Case No. 89 - 1470 - C

UNITED STATES OF AMERICA
Defendant

DECLARATIONS

Pursuant to the provisions at 28 U.S.C., Section 1746, Roger M. Wood declares :

1. I am a duly commissioned Revenue Officer assigned to the Special Procedures Branch of the Collection Division of the Office of the District Director of Internal Revenue at Wichita, Kansas

2. In that capacity, I am familiar with the requirements and procedures surrounding the issuance of the notice of assessments and demand for payment required by Section 6303 (a) of the Internal Revenue Code.

3. In order to comply with Section 6303 (a), the appropriate I.R.S. Service Center sends the Notice of assessment and demand for payment to the taxpayer by certified mail.

4. I have reviewed the records available to me through the Integrated Data Retrieval System (IDRS) concerning the accounts of Raymond J.VanSkiver and Alma L. VanSkiver. The purpose of this review was to verify that the notices required by Section 6303 (a) were sent to Raymond J. VanSkiver, SSN 508-14-3783 and to Alma L. VanSkiver, SSN 508-20-3445. Such information is kept by the Internal Revenue Service in the IDRS system in the ordinary course of its business. The IDRS system discloses that Section 6303 (a) notices were sent to Raymond Van Skiver as follows :

Tex Period Ended	Type of Tax	Date of Sec 6303(a) Not.
12/31/81	Income	10/28/85
12/31/82	Income	10/28/85
12/31/83	Income	10/28/85

The IDRS system discloses that Section 6303 (a) notices were sent to Alma VanSkiver as follows :

Tax Period Ended	Type of Tax	Date of Sec 6303(a) Not.
12/31/82	Income	10/28/85
12/31/83	Income	10/28/85
12/31/84	Income	12/04/89
12/31/85	Income	12/04/89

5. The foregoing statement is true, accurate and complete to the best of my knowledge, information, and belief.

Roger M. Wood

Dated : 03 / 08 / 90

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAYMOND J. VAN SKIVER
and ALMA L. VAN SKIVER, Plaintiffs,

v Case No. 89 - 1470 - C

UNITED STATES OF AMERICA
Defendant

DECLARATIONS

Pursuant to the provisions at 28 U.S.C., Section 1746, Charles I. Tincher declares :

1. I am a duly commissioned Revenue Officer assigned to the Field Branch of the Collection Division of the Office of the District Director of Internal Revenue at Wichita, Kansas.

2. In that capacity, I am familiar with the requirements of Internal Revenue Code Section 6335 (a) and (b) concerning the issuance of Notice of Seizure and Notice of Sale.

3. On January 13, 1987, I seized certain real property interest pursuant to unsatisfied tax liabilities owed by Raymond J. VanSkiver and Alma L. VanSkiver.

4. On January 13, 1987, at the residence of Mr. and Mrs. VanSkiver I handed Notices of Seizures, copies of which are attached to this declaration, to Raymond J. and Alma L. VanSkiver. I was accompanied by Revenue Officer Walter C. Ramsden and two Special Agents from the Wichita District's Criminal Investigation Division.

5. I sent, by Certified Mail, Notices of Sale with respect to the above described seizure to Raymond J. Van Skiver and Alma L. VanSkiver, announcing a public sale to be held on March 12, 1987. Attached are certified mail receipts indicating that these two Notices were signed for on January 30, 1987.

6. Because no bidders appeared at the time of sale on March 12, 1987, I postponed the sale to April 30, 1987.

7. On April 13, 1987, by Certified Mail, I sent new Notices of Sale to Raymond J. VanSkiver and Alma L. VanSkiver. Attached are copies of certified mail receipt showing these Notices of Sale were signed for on April 24, 1987.

8. On April 11, 1987, Notices of Public Auction Sale were published in the Wichita Egale newspaper. A copy of these advertisements are attached.

The foregoing statement is true, accurate, and complete to the best of my knowledge, information and belief.

Charles I Tincher

(No Date affixed hereto)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RAYMOND J. VAN SKIVER
and ALMA L. VAN SKIVER, Plaintiffs,

v Case No. 89 - 1470 - C

UNITED STATES OF AMERICA
Defendant

DECLARATIONS

Pursuant to the provisions at 28 U.S.C., Section 1746, Boris Bulatkin declares :

1. I am a Senior Reviewer, Quality Review Staff of the Office of the District Director of Internal Revenue at Wichita, Kansas.

2. In that capacity, I am familiar with the requirements and procedures surrounding the issuance of the notice of deficiency required by Section 6212 of the Internal Revenue Code.

3. In order to comply with Section 6212, the notice of deficiency is prepared by the Wichita District of the Internal Revenue Service and sent to the taxpayer by certified mail. This mailing is evidenced by Postal Service Form 3877, "Acceptance of Registered, Insured, C.O.D. and Certified Mail."

4. I have reviewed Postal Service Form 3877 concerning Alma L.VanSkiver. (Please see Document 1 attached.) The purpose of this review was to verify that the notices required by Section 6212 were sent to

Alma VanSkiver, SSN 508-20-3445. Postal Service Form 3877 is kept by the Internal Revenue Service in the ordinary course of its business. Postal Service Form 3877 discloses that Section 6212 notices were sent to Alma VanSkiver as follows :

Tax Period Ended	Type of Tax	Date of Sec 6212 Not.
12/31/84	Income	6/5/89
12/31/85	Income	6/5/89

5. The foregoing statement is true, accurate and complete to the best of my knowledge, information and belief.

Boris Bulatkin

Dated : March 8, 1990

Alvin L. VanSkiver 168 a
Note to file

Work Paper No.	Accountant	3/1/83	4/2/85	
	Reviewed By			

The Form 843 filed on 4/2/85 in response to the 90 d. Ltr is a claim for abatement under IRC § 6403(b) since the tax has not been assessed, much less paid.

Therefore, no claim disallowance letter is required.

Boris Bulatkin
Reviewer, D048
4-2-85

Exhibit "B" -3
FOIA material
The tax has not been assessed
Tax never was owed

Professional Forms • Omaha, Ne. 68102

IRS
Exhibits
23

ICE

below.

FEB 03 1987

U.S.MAIL

PENALTY FOR PRIVATE USE, $300

IRS
(Name of Sender)
PO Box 2278 STOP 546
(Street or P.O. Box)
WICHITA, KS 67201
(City, State, and ZIP Code) 1432

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS

SENDER INSTRUCTIONS

Print your name, address, and ZIP Code in the space below.

- Complete items 1, 2, 3, and 4 on the reverse.
- Attach to front of article if space permits, otherwise affix to back of article.
- Endorse article "Return Receipt Requested" adjacent to number.

[illegible]

U.S.MAIL

PENALTY FOR PRIVATE USE, $300

RETURN TO

IRS
(Name of Sender)
PO Box 2278 STOP 546
(Street or P.O. Box)
WICHITA, KS 67201
[illegible] (City, State, and ZIP Code)

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS

SENDER INSTRUCTIONS
Print your name, address, and ZIP Code in the space below.
- Complete items 1, 2, 3, and 4 on the reverse.
- Attach to front of article if space permits, otherwise affix to back of article.
- Endorse article "Return Receipt Requested"
- adjacent to number.

U.S.MAIL

PENALTY FOR PRIVAT USE, $300

RETURN TO

INTERNAL REVENUE SERVICE
P.O. Box 2278, Stop 5100 WIC
Wichita, Kansas 67202

(Name of Sender)

(Street or P.O. Box)

(City, State, and ZIP Code)

R.O. 1103

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS

SENDER INSTRUCTIONS
Print your name, address, and ZIP Code in the space below.
- Complete items 1, 2, 3, and 4 on the reverse.
- Attach to front of article if space permits, otherwise affix to back of article.
- Endorse article "Return Receipt Requested"
- adjacent to number.

U.S.MAIL

PENALTY FOR PRIVATE USE, $300

RETURN TO

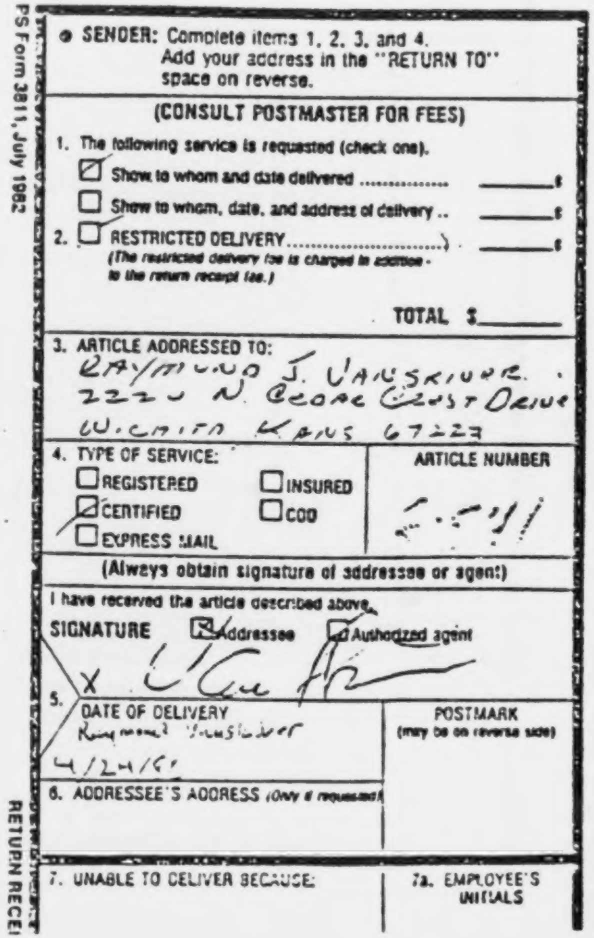
INTERNAL REVENUE SERVICE
P.O. Box 2278, Stop 5100 WIC
Wichita, Kansas 67202

(Name of Sender)

(Street or P.O. Box)

(City, State, and ZIP Code)

RD 1103



● SENDER: Complete items 1, 2, 3, and 4.
Add your address in the "RETURN TO" space on reverse.

(CONSULT POSTMASTER FOR FEES)

1. The following service is requested (check one).
☒ Show to whom and date delivered .... $
☐ Show to whom, date, and address of delivery .. $
2. ☐ RESTRICTED DELIVERY .... $
(The restricted delivery fee is charged in addition to the return receipt fee.)

TOTAL $

3. ARTICLE ADDRESSED TO:
RAYMUND J. VANSKIVER
2220 N. Cedar Crest Drive
Wichita Kans 67223

4. TYPE OF SERVICE:
☐ REGISTERED ☐ INSURED
☒ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER
[illegible]

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☒ Addressee ☒ Authorized agent
5. X

DATE OF DELIVERY
Raymond Vanskiver
4/24/[illegible]

POSTMARK
(may be on reverse side)

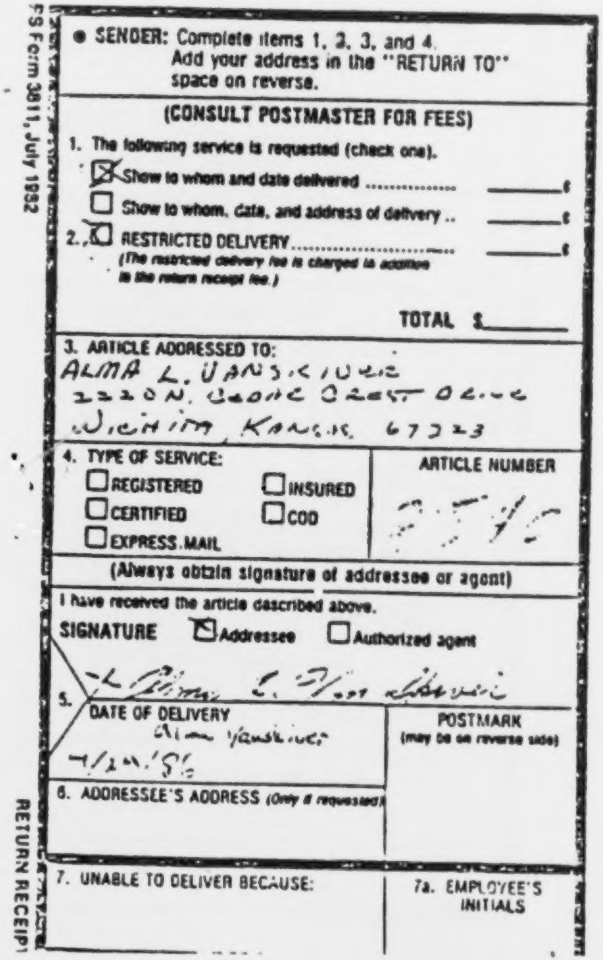
6. ADDRESSEE'S ADDRESS (Only if requested)

7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS

PS Form 3811, July 1982

RETURN RECEI



● SENDER: Complete items 1, 2, 3, and 4.
Add your address in the "RETURN TO" space on reverse.

(CONSULT POSTMASTER FOR FEES)

1. The following service is requested (check one).
☒ Show to whom and date delivered .... $
☐ Show to whom, date, and address of delivery .. $
2. ☒ RESTRICTED DELIVERY .... $
(The restricted delivery fee is charged in addition to the return receipt fee.)

TOTAL $

3. ARTICLE ADDRESSED TO:
ALMA L. VANSKIVER
2220 N. Cedar Crest Drive
Wichita, Kansas 67223

4. TYPE OF SERVICE:
☐ REGISTERED ☐ INSURED
☐ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER
[illegible]

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☒ Addressee ☐ Authorized agent
5. X Alma L. Vanskiver

DATE OF DELIVERY
Alma Vanskiver
4/24/[illegible]

POSTMARK
(may be on reverse side)

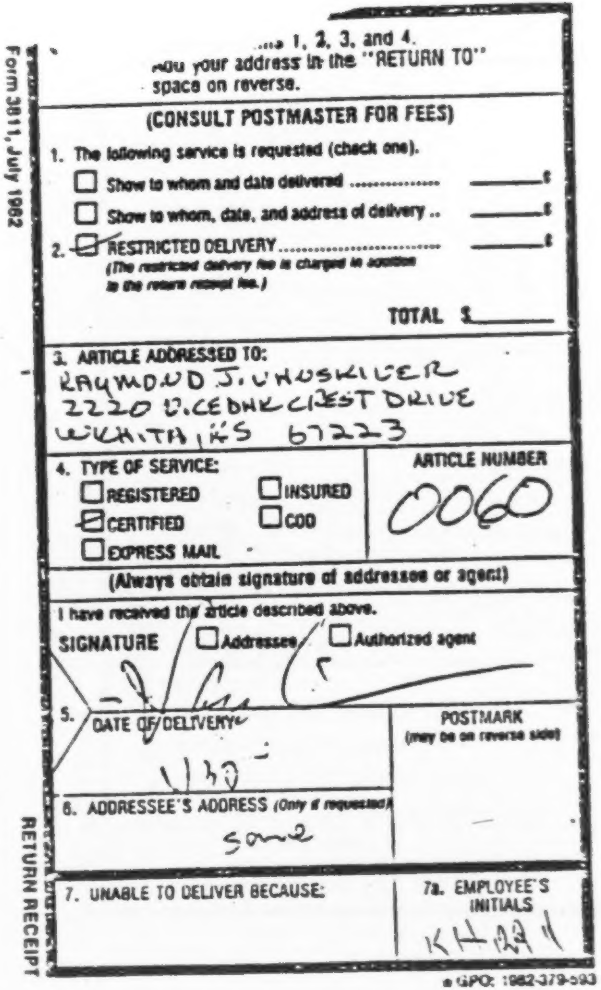
6. ADDRESSEE'S ADDRESS (Only if requested)

7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS

PS Form 3811, July 1982

RETURN RECEIPT



1, 2, 3, and 4.
your address in the "RETURN TO"
space on reverse.

(CONSULT POSTMASTER FOR FEES)

1. The following service is requested (check one).
   - ☐ Show to whom and date delivered .... ______¢
   - ☐ Show to whom, date, and address of delivery .. ______¢
2. ☑ RESTRICTED DELIVERY .... ______¢
   (The restricted delivery fee is charged in addition to the return receipt fee.)

TOTAL $______

3. ARTICLE ADDRESSED TO:
RAYMOND J. VHUSKIVER
2220 W. CEDAR CREST DRIVE
WICHITA, KS 67223

4. TYPE OF SERVICE:
☐ REGISTERED ☐ INSURED
☑ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER
0060

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

5. DATE OF DELIVERY
1/30

POSTMARK
(may be on reverse side)

6. ADDRESSEE'S ADDRESS (Only if requested)
same

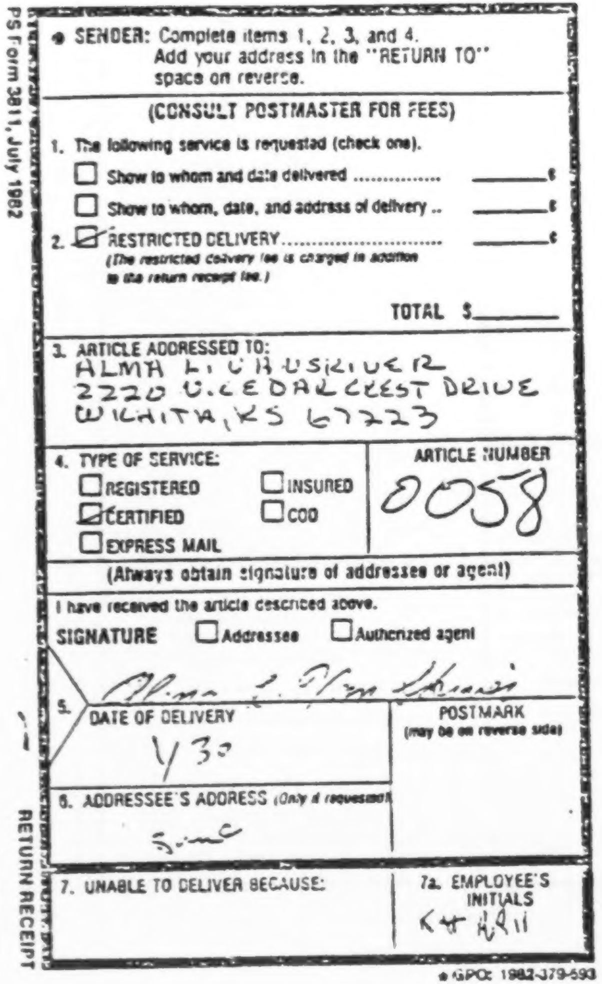
7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS
KH

● GPO: 1982-379-593

Form 3811, July 1982

RETURN RECEIPT



● SENDER: Complete items 1, 2, 3, and 4.
Add your address in the "RETURN TO"
space on reverse.

(CONSULT POSTMASTER FOR FEES)

1. The following service is requested (check one).
   - ☐ Show to whom and date delivered .... ______¢
   - ☐ Show to whom, date, and address of delivery .. ______¢
2. ☑ RESTRICTED DELIVERY .... ______¢
   (The restricted delivery fee is charged in addition to the return receipt fee.)

TOTAL $______

3. ARTICLE ADDRESSED TO:
ALMA L. VHUSKIVER
2220 W. CEDAR CREST DRIVE
WICHITA, KS 67223

4. TYPE OF SERVICE:
☐ REGISTERED ☐ INSURED
☑ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER
0058

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

5. DATE OF DELIVERY
1/30

POSTMARK
(may be on reverse side)

6. ADDRESSEE'S ADDRESS (Only if requested)
same

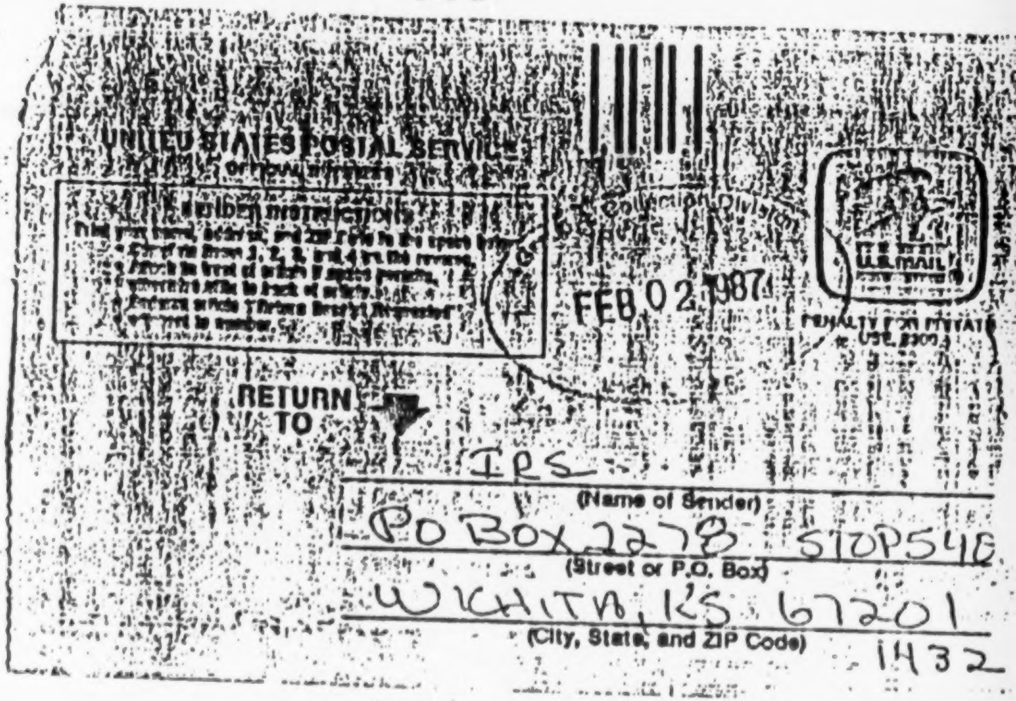
7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS
KH

● GPO: 1982-379-593

PS Form 3811, July 1982

RETURN RECEIPT



UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS

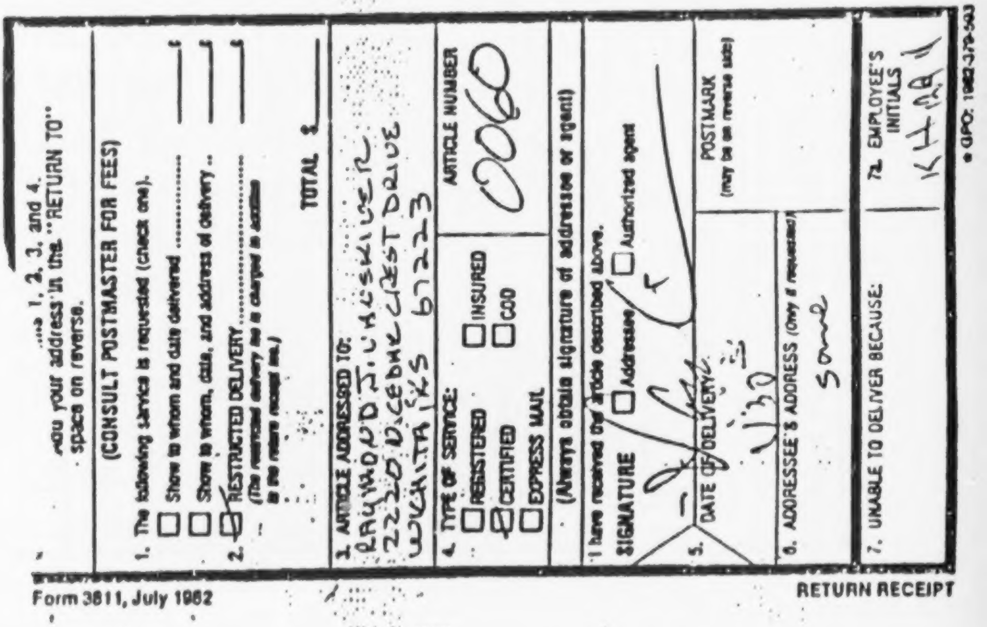
SENDER INSTRUCTIONS
Print your name, address, and ZIP Code in the space below.
• Complete items 1, 2, 3, and 4 on the reverse.
• Attach to front of article if space permits, otherwise affix to back of article.
• Endorse article "Return Receipt Requested" adjacent to number.

Collection Division
FEB 02 1987

PENALTY FOR PRIVATE USE, $300

RETURN TO

IRS
(Name of Sender)
PO BOX 2278 STOP 5416
(Street or P.O. Box)
WICHITA, KS 67201
(City, State, and ZIP Code)
1432



... 1, 2, 3, and 4.
Add your address in the "RETURN TO" space on reverse.

(CONSULT POSTMASTER FOR FEES)

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☐ Show to whom, date, and address of delivery .. ______¢
2. ☑ RESTRICTED DELIVERY .... ______¢
(The restricted delivery fee is charged in addition to the return receipt fee.)

TOTAL $______

3. ARTICLE ADDRESSED TO:
RAYMOND J. UHLSKIVER
2220 N. CEDAR CREST DRIVE
WICHITA, KS 67223

4. TYPE OF SERVICE:
☐ REGISTERED ☐ INSURED
☑ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER
0060

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

5. DATE OF DELIVERY
1/30

POSTMARK
(may be on reverse side)

6. ADDRESSEE'S ADDRESS (Only if requested)
same

7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS
KH AA

Form 3811, July 1982

RETURN RECEIPT

• GPO: 1982-379-593

UNITED STATES POSTAL SERVICE
OFFICIAL BUSINESS

SENDER INSTRUCTIONS
Print your name, address, and ZIP Code in the space below.
- Complete items 1, 2, 3, and 4 on the reverse.
- Attach to front of article if space permits, otherwise affix to back of article.
- Endorse article "Return Receipt Requested" adjacent to number.

FEB 02 1987
I.R.S.
Wichita, Kansas

U.S. MAIL
PENALTY FOR PRIVATE USE, $300

RETURN TO

IRS
(Name of Sender)
PO Box 2278 STOP 5400
(Street or P.O. Box)
WICHITA, KS 67201 +432
(City, State, and ZIP Code)

● SENDER: Complete items 1, 2, 3, and 4.
Add your address in the "RETURN TO" space on reverse.

(CONSULT POSTMASTER FOR FEES)

1. The following service is requested (check one).
   - ☐ Show to whom and date delivered .... ______¢
   - ☐ Show to whom, date, and address of delivery .. ______¢
2. ☑ RESTRICTED DELIVERY .... ______¢
   (The restricted delivery fee is charged in addition to the return receipt fee.)

TOTAL $______

3. ARTICLE ADDRESSED TO:
ALMA L. VANSKIVER
2220 N. CEDARCREST DRIVE
WICHITA, KS 67223

4. TYPE OF SERVICE:
☐ REGISTERED ☐ INSURED
☑ CERTIFIED ☐ COD
☐ EXPRESS MAIL

ARTICLE NUMBER
0058

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

5. Alma L. Van Skiver

DATE OF DELIVERY
1/30

POSTMARK
(may be on reverse side)

6. ADDRESSEE'S ADDRESS (Only if requested)
Same

7. UNABLE TO DELIVER BECAUSE:

7a. EMPLOYEE'S INITIALS
KH AAll

★ GPO: 1982-379-593

PS Form 3811, July 1982

RETURN RECEIPT

Thomas HOWARD and Margaret
Howard, Plaintiffs,

v.

Donald L. ADLE, a/k/a Dudley Adle, and
United States of America, Department
of Treasury, Internal Revenue Service,
Defendants.

Civ. No. 80-74444.

United States District Court,
E. D. Michigan, S. D.

Jan. 13, 1982.

Action was brought seeking to set aside federal tax sale of parcel of real estate. The District Court, Cohn, J., held that: (1) notice of sale left by postal employee at owner's usual place of business did not constitute compliance with the code; (2) even though notice of sale was not made in literal compliance with section of Internal Revenue Code, owners failed to act with sufficient promptness, and therefore, sale was not invalid; and (3) fact that letter from internal revenue incorrectly stated that October 15th was last day of 120-day statutory redemption period when in fact the 120th and final day was October 14th did not render owners' attempted redemption on October 15th valid.

Ordered accordingly.

1. Internal Revenue ⇨4860

For purposes of requirement of section of Internal Revenue Code governing notice of seizure and sale of property that "notice in writing shall be given by the Secretary or his delegate to the owner of the property," an employee of another executive department, such as the post office, does not meet the definition of "delegate"; therefore, notice of sale left by postal employee at owner's usual place of business did not constitute compliance with the code. 26 U.S.C.A. §§ 6335(a, b), 7701(a)(12)(A)(i).

2. Internal Revenue ⇨4860

Even though notice of federal tax sale of owners' property was not made in literal compliance with section of Internal Revenue Code, owners failed to act with sufficient promptness where they had actual notice prior to the sale, where one of the owners was an attorney and, thus, particularly able to appreciate nature of defect in notice and need to act swiftly to set aside sale, and where virtually identical scenario was acted out previous year, only difference being that owners tendered redemption amount on statutory deadline rather than being a day late; therefore, sale was not invalid because of failure to comply with notice statute. 26 U.S.C.A. §§ 6335(a, b), 7701(a)(12)(A)(i).

3. Internal Revenue 🔑4862

District court lacks power to extend statutory redemption period under statute governing redemption of real estate after sale, even for powerful equitable considerations. 26 U.S.C.A. § 6337(b).

4. Internal Revenue 🔑4862

Fact that letter from internal revenue incorrectly stated that October 15th was last day of 120-day statutory redemption period when in fact the 120th and final day was October 14th did not render property owners' attempted redemption on October 15th valid, especially where owners were familiar with procedure for redemption, having previously redeemed the same parcel on the 120th day. 26 U.S.C.A. § 6337(b).

Alan M. Valade, Valade, MacKinnon & Higgins, Detroit, Mich., for plaintiffs.

Leonard R. Gilman, U. S. Atty., Detroit, Mich., Ronald F. Fischer, Tax Div., Dept. of Justice, Washington, D. C., for IRS.

Charles A. Murphy, Southfield, Mich., for Adle.

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1. "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court."

2. "Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter (1) to

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

MEMORANDUM OPINION AND ORDER

COHN, District Judge.

This is an action seeking to set aside a federal tax sale of a parcel of real estate on the grounds that (1) the notices of seizure and sale were defective, and (2) plaintiffs properly redeemed following the sale. Defendants are the purchasers at the tax sale, Donald Adle, and the United States in the person of the Internal Revenue Service (IRS). Jurisdiction is based on 28 U.S.C. § 1340[1] and 28 U.S.C. § 2410(a).[2] Before the Court are cross motions for summary judgment by plaintiffs and the United States.

I.

The following facts are uncontroverted.

A.

In 1972 plaintiffs purchased on land contract the parcel in question: a house and lot in Redford Township, Michigan. Prior to the seizure and sale involved in this case the parcel was seized and sold in 1979 for unpaid federal income taxes; however, plaintiffs redeemed on the final day of the redemption period.

On March 26, 1980 the parcel was again seized for unpaid federal income taxes. Notice of the seizure was personally served on plaintiffs' daughter at their residence[3] and mailed to plaintiff Thomas Howard's office. Notice that the property would be sold on May 22, 1980 was mailed to plaintiffs' residence and to Thomas Howard's office May 8, 1980. The May 22 sale went forward but was subsequently declared void when the high bidder failed to tender the full bid price.

Thereafter, notice of a June 16, 1980 sale date was sent by certified mail on June 3, 1980 to plaintiffs' residence and Thomas Howard's office. The notice sent to Thomas Howard's office was received June 4, 1980; however the notice to plaintiffs' residence was returned unclaimed after several attempts at delivery. Plaintiffs had actual prior notice of the June 16, 1980 sale.[4] On June 16 the parcel was sold to defendant Donald L. Adle, the vendor under the land contract on the parcel

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quiet title to . . . real property on which the United States has or claims a mortgage or other lien". *See Aqua Bar & Lounge v. U. S. Dept. of Treasury*, 539 F.2d 935 (3rd Cir. 1976).

[3] United States' Request for Admissions to Plaintiffs (Admissions). No. 1. The request was served on July 7, 1981 and has not been answered or objected to. Plaintiffs have not moved to withdraw or amend the admissions, despite defendant's reliance on them in moving for summary judgment; nor have they denied the underlying facts. *See* Fed.R.Civ.P. 36.

B.

In a letter dated September 30, 1980, the Detroit District Director of the IRS notified plaintiffs of the sale and their right to redeem. The letter contained the following statement:

> "Under Section 6337 of the Internal Revenue Code, as amended by the Federal Tax Lien Act of 1966, you have 120 days within which to redeem the property. The redemption period expires on the above date."

The "above date" appearing at the letter's heading was October 15, 1980. On October 15 a Nick Zaika appeared at the Dearborn, Michigan IRS office and tendered a cashier's check payable to defendant Adle to redeem the parcel. On November 13, 1980 the IRS returned the check to plaintiffs with an explanation that the September 30 letter incorrectly stated that October 15, 1980 was the last day of the 120 day statutory redemption period but in fact the 120th and final day was October 14, 1980.[4]

C.

On November 16, 1980 the IRS executed a deed of the parcel to defendant Adle. This action was filed November 25, 1980.

[4] Admissions, No. 7.

A.

The Internal Revenue Code requirements for notice of seizure and sale of property are as follows:

"(a) Notice of seizure.—As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale.—The Secretary or his delegate shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a

> notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

26 U.S.C. § 6335(a), (b).

B.

On October 5, 1981 the Court ruled that notice of the seizure was properly given.[3]

No claim is made that the IRS failed to comply with the publication and posting requirements for the notice of sale. Plaintiffs' sole complaint is that the notice of the June 16, 1980 sale was neither "given" to them nor "left" at their place of abode or business.

C.

The United States admits that it was required to provide notice of sale to plaintiffs in compliance with the first sentence of § 6335(a), but argues that the statutory language includes certified mailing. It reasons that notice of sale was left at Howard's usual place of business, albeit by a postal rather than an IRS employee. This is simply an implausible reading of the statute.

[1] Notice must be given by "the Secretary or his delegate". The Secretary, of course, is the Secretary of the Treasury; "or his delegate" means:

> "any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more re-delegations of authority, to perform the function mentioned or described in the context."

26 U.S.C. § 7701(a)(12)(A)(i). An employee of another executive department, such as the Post Office, does not meet the definition of "delegate".[8] That Congress did not contemplate that mailing was synonymous with "giving" notice to an owner or "leaving" it at his home or business is apparent from the second sentence of § 6335(a).

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[8] Plaintiffs had argued that Thomas Howard was separated from Margaret Howard, his wife, at the time the notice of seizure was left at the residence occupied by Margaret Howard,

Where the owner cannot be readily located or has no dwelling or business in the district, the notice "may be mailed to his last known address". The United States argues that the only difference between the first and second sentence is that the latter permits mailing to "the last known address" rather than to the usual place of abode or business. Had Congress so intended, surely it would have used the word "mailed" in both sentences, rather than requiring that notice be "left" by the Secretary or his delegate in the first sentence.

The IRS itself has, by regulation, interpreted § 6335 to require delivery of the notice rather than mailing unless the owner cannot be readily located or has no place of abode or business in the district.

> "As soon as practicable after seizure of the property, the district director shall give notice of sale in writing to the owner. Such notice shall be delivered to the owner or left at his usual place of abode or business if located within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address."

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and therefore Thomas Howard was not properly served at *his* place of abode. This argument was foreclosed by Admissions No. 1, that both plaintiffs resided at the address in question during the relevant period.

26 C.F.R. § 301.6335-1(b)(1) (1981). The internal operations manual of the IRS is even more specific:

> "The original notice [of sale] will be delivered to the taxpayer personally. If personal service has been attempted but could not be accomplished, the notice will be sent by Certified Mail, Return Receipt Requested to the taxpayer's last known address."

Internal Revenue Manual § 5356.1(2) (1980). The United States does not claim that it attempted to serve the notice of sale personally or that plaintiffs could not be readily located within the district.

D.

[2] The Court's inquiry, however, does not end with the finding that notice of sale was not made in literal compliance with the statute. This is, in essence, an action to quiet title. Because plaintiffs seek equitable relief, they must show that they themselves have done equity. *McAndrews v. Belknap*, 141 F.2d 111, 115 (6th Cir. 1944); *Johnson v. Gartlan*, 470 F.2d 1104, 1106 (4th Cir. 1973). Because the parcel is located in Michigan, Michigan law applies. *McAndrews, supra; see also* 28 U.S.C. § 2410(c).[7]

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[6] The statute does provide that in Guam and American Samoa "delegate" may include an officer or employee of any other federal agency duly authorized by the Secretary. 26 U.S.C. § 7701(a)(12)(B).

> The general rule in Michigan is:
>
> "Where . . . a serious defect occurs in the tax sale, it may be attacked by the owner of the premises, provided he acts promptly and does equity."

Detroit Trust Co. v. Lieberwitz, 275 Mich. 429, 436, 266 N.W. 406 (1936). *See also Simasko v. Township of Harrison*, 15 Mich. App. 584, 166 N.W.2d 635 (1969).

In *Blondin v. Griffin*, 133 Mich. 647, 95 N.W. 739 (1903), the Michigan Supreme Court declined to set aside a technically defective tax sale because of the owner's failure to act promptly on facts strikingly similar to this case.

> "[Petitioner] knew that his taxes were unpaid, and that proceedings were instituted in 1901 for the sale of his land. The county treasurer had written him of the pendency of the suit, and that his land would be sold unless his taxes were paid. To this he paid no attention, did not appear in the suit, or even at the sale, to make protest. Nearly three months after the sale and after confirmation he applies to the court to have the sale set aside for the reason that the action of the auditor general in setting aside the [prior] sales in 1895 and 1896 is invalid . . . . Petitioner was entitled to redeem from this sale by complying with Act No. 229, Pub. Acts 1897. Instead of complying with this statute, he chose to resort to

> this suit. We think his conduct estops him from now insisting upon this irregularity of the auditor general."

133 Mich. at 648, 95 N.W. 739.

In equity there is, of course, no absolute rule as to what period of delay will bar relief; each case must be determined according to its own peculiar circumstances. *Hoehn v. Crews*, 144 F.2d 665, 671 (10th Cir. 1944). Here three factors lead the Court to conclude that plaintiffs failed to act with sufficient promptness. First, plaintiffs had actual notice prior to the sale. Second, Thomas Howard is an attorney and thus particularly able to appreciate the nature of the defect in a notice and the need to act swiftly to set aside a sale. Finally, virtually the identical scenario was acted out the previous year, the only difference being that plaintiffs tendered the redemption amount on the statutory deadline in 1979 rather than being a day late as they were in 1980.

Plaintiffs did not notify either the IRS or defendant Adle during the 120 day redemption period that they considered the sale invalid. Indeed, their attempt to redeem at the last moment suggests they considered the sale valid. *Cf. Johnson, supra* (taxpayer ratified technically invalid sale by accepting excess proceeds of sale). Only after the IRS deeded the property to defendant Adle did plaintiffs raise a claim of invalidity by the filing of this action.

Plaintiffs rely on two cases for the principle that a tax sale should be set aside for failure to comply with the notice requirements of § 6335. *Reece v. Scoggins*, 506 F.2d 967 (5th Cir. 1975) and *Aqua Bar & Lounge, Inc. v. United States*, 438 F.Supp. 655 (E.D.Pa.1977).

The Court finds these cases distinguishable for at least two reasons. First, both cases proceeded directly from the finding that noncompliance with the notice of sale requirements renders the sale *voidable* to holding the sale void without considering whether or not the taxpayer was entitled to equitable relief under the applicable state law.

Second, in neither case did the undisputed facts show that the taxpayer received prior written notice of the sale. In *Reece* not only was there no personal service, but notice of the sale was not mailed in time to be delivered prior to the sale date, and no notice of the adjourned sale date was

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7. This statute, which confers jurisdiction over the United States as a defendant in a quiet title action, thus waiving sovereign immunity, provides:

"A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated."

mailed. Thus there was a substantial issue whether the taxpayer had been given "an opportunity to be present at the tax sale and bid on the property", the central purpose of the statutory notice requirements. 506 F.2d at 971. The court in *Aqua Bar* refused to speculate as to whether mailed notice of sale had actually reached the taxpayer because the "purpose of requiring a particular method of giving notice is to prevent disputes over whether notice was received". 438 F.Supp. at 657. Here there is no dispute: plaintiffs received prior written notice. There is no claim that they were denied the opportunity to be present at the sale.

III.

Plaintiffs also argue that even if the tax sale is not void, the attempted redemption on October 15, 1980 should be honored. The statute provides in relevant part:

> "*Redemption of real estate after sale.* —(1) *Period.*—The owners of any real property sold as provided in section 6335 . . . shall be permitted to redeem the property sold . . . at any time within 120 days after the sale thereof.
>
> (2) *Price.*—Such property . . . shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary or his delegate . . . the amount paid by such purchaser and interest

> thereon at the rate of 20 percent per annum."

26 U.S.C. § 6337(b).

[3, 4] The expiration date of the redemption period is calculated by including the date of sale. *Ballard v. United States*, 67 2 USTC ¶ 9652 (D.Colo.1967); *Guthrie v. Curnutt*, 417 F.2d 764 (10th Cir. 1969). This Court simply lacks the power to extend the statutory period, even for powerful equitable considerations. *Anselmo v. James*, 449 F.Supp. 922, 926 (D.Mass.1978) (redemption four days late because travel restricted by state of emergency declared due to blizzard); *Keely v. Sanders*, 99 U.S. 441, 445-46, 25 L.Ed. 327 (1878) (citing with approval *Finley v. Brown*, 22 Iowa 538 (1867), which held that right to redeem could not be extended even though owner resided in a Confederate state during the Civil War). The application of the rule here is less troubling inasmuch as plaintiffs were familiar with the procedure for redemption having redeemed the same parcel in 1979 on the 120th day.

IV.

Accordingly, for the reasons herein stated, plaintiffs' motion for summary judgment is DENIED and the United States' motion for summary judgment is GRANTED.

SO ORDERED.